

Aug. 19. 1912

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THE  
LAW OF EXECUTORS  
AND  
ADMINISTRATORS.

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By SAMUEL TOLLER, Esq.  
OF LINCOLN'S INN, BARRISTER AT LAW.

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SORTE SUPREMA  
PERMUTAT DOMINOS, ET CREDIT IN ALTERA JURA.  
HOR.

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<sup>S.</sup>  
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1800.



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REFACE

NOTARY PUBLIC

THE subject of the following article  
comprehends a great variety of points  
in which the public are generally inter-  
ested. In 1881, a period of  
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a personal responsibility to the public mind  
acts with such an extraordinary rapidity  
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with favour.

The book of the night distinguished more  
on this subject, is that which is entitled  
"The Book of the Night" by the same author.



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## P R E F A C E.

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**T**HE subject of the following treatise comprehends a great variety of points, in which the public are very generally interested. In the ordinary course of human affairs, almost all persons at some period of their lives are called to exercise the office of a personal representative, or to transact business with such as are invested with it. An attempt, therefore, to unfold it's nature, to describe its rights, and to point out its duties, as there is no modern work of any reputation which professes exclusively to treat of these topics, will, I persuade myself, be regarded with favour.

The book of the most distinguished merit on this subject, is that which is entitled,  
the



the " Office and Duty of Executors ; and which, although it bear the name of Thomas Wentworth, is now generally ascribed to Mr. Justice Dodderidge. It was first published anonymously in the year 1641 ; to the third edition, printed in the same year, was prefixed for the first time the fictitious name I have just mentioned. The eighth edition appeared in 1689, to which Chief Baron Comyns in his Digest constantly refers. In 1703, the ninth edition was published, with a Supplement by H. Curson ; the twelfth edition was published in 1762, with references, by a Gentleman of the Inner Temple, and in 1774, the thirteenth and last edition, by Mr. Serjeant Wilson.

Of the original work it is no undue praise to assert, that it is worthy the pen of so learned an author. It is calculated to engage the attention of the reader, and contains very sound principles, and authentic information. At the same time it must be confessed, that it is often uncouth, and sometimes obscure, in it's language ; altogether

ther inartificial in it's method; and of necessity defective in regard to later adjudications, which, especially in equity, are very numerous and important. It is also silent respecting the office of an administrator. Nor is it much indebted to it's several editors. The Supplement, as it is called, is a mere collection of cases, without order, and without precision.

Under these circumstances I was induced to compile the present treatise. The subject appeared to me capable of an arrangement, more natural and distinct, than any which has hitherto been adopted. Such arrangement I have endeavoured to form, and to preserve. It has, also, been my object to comprise the multifarious matter, of which I have been treating, within as narrow limits as it would admit; and to express myself at once with brevity and clearness. The authorities I have stated very fully in the margin, with a view of facilitating farther researches into points of a nature so interesting, and of so per-

perpetual a recurrence. And it will afford me much satisfaction if I shall have contributed to extend so useful a species of knowledge.

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# **LAW OF EXECUTORS**

**AND**

## **ADMINISTRATORS.**

### **BOOK I.**

#### **OF THE APPOINTMENT OF EXECUTORS AND ADMINISTRATORS.**

##### **CHAP. I.**

**OF WILLS AND CODICILS—WHO MAY MAKE THEM—  
WHO NOT—HOW THEY ARE ANNULLED.**

**B**EFORE I enter on the subject of this treatise,  
I shall state some general propositions in re-  
gard to wills.

A will or testament is defined to be the legal  
declaration of a party's intentions, which he di-  
rects to be performed after his death.

A will may relate either to real, or to personal  
property. In the former case, it is denominated

**B**

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5 4 Bac. Abr.  
243. 2 Bl.  
Comm. 378. 501.

devise, and is considered in the light of a conveyance<sup>b</sup>. By the statute of frauds and perjuries, 29 *Car. 2. c. 3.* it shall not only be in writing, but signed by the testator, or some other person in his presence, and by his express directions, and be subscribed in his presence by three or four credible witnesses.

A will, as it respects personal property, is of two species, written, and nuncupative; if of the former, it may be committed to writing either by the testator himself or by his directions: nor is the subscription of his name to the instrument, nor the affixing of his seal to the same, nor the presence of witnesses at its publication, essential to its validity; yet it is safer and more prudent, and leaves less in the breast of the ecclesiastical judge, if it be signed or sealed by the testator, and published in the presence of witnesses<sup>c</sup>.

4 5 Bl. Com.  
501. 502.  
Vide Com.  
Rep. 451.

With regard to nuncupative wills, the unqualified allowance of them was found productive of the greatest frauds, and it became necessary to subject them to very strict regulations. Accordingly, by the stat. 29 *Car. 2.* above mentioned, it is enacted, that no such will shall be good where the estate thereby bequeathed shall exceed the value of 30*l.* that is not proved by the oaths of three witnesses at the least, who were present at the making thereof, (who, by the stat. 4 & 5 *Ann. c. 16.* must be such as are admissible on trials at common law), nor unless it be proved, that the testator, at the  
time

OF WILLS AND CODICILS.

time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect; nor, unless such nuncupative will were made in the time of the last sickness of the deceased, and in his dwelling-house, or where he had been resident for the space of ten days or more, next before the making of such will; except where such person was taken sick, from home, and died before his return; nor, after six months past after the speaking of the pretended testamentary words, shall any testimony be received to prove any will nuncupative, except the testimony or the substance thereof were committed to writing within six days after the making of the said will.

Soldiers in actual military service, and mariners or seamen at sea, are exempted from the provisions of this act. The former may at this day make nuncupative wills, and dispose of their goods, wages, and other personal chattels, without those forms and solemnities which the law requires in other cases<sup>d</sup>.

But, with respect to the latter, this license no longer exists. The perpetual impositions practised on this meritorious and unsuspecting body of men, induced the legislature to adopt a new policy, and to divest them of a privilege, which, instead of being beneficial to them, was perverted to purposes the most injurious.

d 1 Bl. Com.  
417. Stat. 29  
Car. 2. c. 3.  
1. 23. 5 W. 2.  
c. 21. 6.

Many salutary regulations are accordingly prescribed by the statutes 26 Geo. 3. c. 63. and 32 Geo. 3. c. 34. in regard to the making and probate of the wills of petty officers and seamen in the king's service, and of non-commissioned officers of marines, and marines, serving on board a ship in the king's service, which I shall defer specifying till I treat of probates.

A codicil is a supplement to a will, annexed to it by the testator, and to be taken as part of the same, either for the purpose of explaining or altering, or of adding to, or subtracting from, his former dispositions.

2 Bl. Com.  
300. Swinh.  
Part 1. f. 5.

A codicil may be annexed to the will either actually or constructively. It may not only be written on the same paper, or affixed to or folded up with the will, but may be written on a different paper, and deposited in a different place.

A codicil may be annexed either to a devise of lands, or to a will of personal estate. To alter the former, a codicil must by the statute of frauds be in writing, and signed by the deviser in the presence of three, or four witnesses declaring the same. To a will of personal estate it may be either written or nuncupative, provided, in case of its being the latter, it merely supply an omission in the instrument. Therefore A. having disposed of part of his effects by his will in writing, may dispose of the residue

1 P. Wms.  
344, & Not. 1.  
ibid. vid.  
Doug. 244.  
Not. 2.



## Ch. I. OF WILLS AND CODICILS.

residue by a nuncupative codicil<sup>t</sup>. But by the same statute such codicil shall not operate to repeal or alter a will. A written codicil respecting personal estate is authenticated in the same manner as a will of such property.

g Comp. Dig.  
Devise (C.)  
Raym. 334.

A will may be avoided or annulled, 1st, by the incapacity of the party making it; 2dly, by the making of another of a later date; 3dly, by cancelling or revoking it.

h 2 Bl. Com.  
302.

There are three grounds of incapacity: the want of sufficient legal discretion; the want of liberty or free will; and the criminal conduct of the party.

1 a Bl. Com.  
496, 497.

To the first are subject all infants under the age of fourteen, if males, and twelve if females<sup>t</sup>; after that period their incapacity ceases; although, on the one hand, it has been strangely asserted, that an infant of any age, even of four years old, may make a testament<sup>1</sup>; and on the other, he has been denied before eighteen, to be competent<sup>2</sup>; yet this, as a matter of ecclesiastical cognizance, must be determined by the ecclesiastical law, which has prescribed the rule as above stated.

1 Off. Ez. 213.  
214. Harg. Co.  
Litt. 89 b.  
Note 6.

1 Perkins s. 37.  
3031 But that  
seems an error  
of the press for  
24. Vide Harg.  
Co Litt. 89 b.  
Note 6.

m Harg. Co.  
Litt. 89 b.

n 2 Bl. Com.  
497. Harg. Co.  
Litt. 89 b.  
Note 6.

But, if the testator, of whatever age, were not of sufficient capacity, that will invalidate his testament. Persons afflicted with madness, or any other mental disability, idiots or natural fools, or those whose intellects are destroyed by age, distem-

per,



per, or drunkenness, all these, are incapable of making a will during the existence of such disability. In this class, also, may be ranked those persons, who, having been born deaf and blind, have ever wanted the common sources of understanding. But a will is not affected by the subsequent insanity of the testator.

In respect to the incapacity arising from the want of liberty or freedom of will, prisoners, captives, and the like, are not by the law of England absolutely disabled to make a testament; but the court has a discretion of judging, whether, from the special circumstances of duress, such act shall be construed involuntary. But a married woman has no power either of devising lands, or of bequeathing chattels. Her personal chattels belong absolutely to the husband. He may also dispose of her chattels real, and he shall have them to himself in case he survive. An interest which necessarily precludes her from such an alienation; yet by the licence of the husband, she may make a testament, and, on marriage, he frequently covenants with her friends to allow her that privilege. So, where he stipulates that personal property shall be enjoyed by the wife separately, it must be so enjoyed with all its incidents, one of which is the power of disposition. And where she has such power over the principal, it extends also to its produce, and accretions.

2 Bl. Com.  
497.  
p 4 Co. 60.

2 Bl. Com.  
497. 498. 4 Co.  
51. 34 & 35.  
Hen. 8. c. 5.  
f. 12.  
2 Dr. & Stud.  
D. 1. c. 7. 4 Bac.  
Abr. 244. Vide  
Stra. 892.

4 Bac. Abr.  
244. in nro.  
30. re. Ch.  
Rep. 3.

2 Vern. 535.  
Prec. Ch. 44.  
255.

But

## OF WILLS AND CODICILS.

But where a feme covert, in consequence of such licence, makes a writing in nature of a will, it seems not in a strict legal sense to operate as a will, but as an appointment, yet it is so far testamentary, that it must be proved in the spiritual court, before her legatee shall be entitled.

If the husband be banished for life by act of parliament, the wife is entitled to make a will. So, where personal property is given to a married woman, for her sole and separate use, she may dispose of it by will, without the assent of her husband.

A feme covert may also make a will of effects, of which she is in possession in *auter droit*, in a representative capacity; for they never can be the property of the husband. So, if she has any pin money, or separate maintenance, it seems she may bequeath the same without his controul.

The queen consort has a general right to dispose of her personal estate by will, without the consent of her lord.

Persons incompetent by their crimes are all traitors and felons, without benefit of clergy, from the time of their conviction and attainder, or outlawry, which amounts to the same; for then their property is no longer at their own disposal, but is altogether forfeited.

u 3 Ark. 136.  
1 Burr. 432.  
2 Bro. Ch.  
Rep. 392.  
Stone v.  
Forfyth,  
Doug. 707.  
Vide also  
2 P. Wms.  
624. 2 Vol. 75.  
61a.  
2 4 Bac. Ab.  
244. 2 Verp.  
104.  
7 3 Bro. Chan.  
Rep. 8.  
2 Off. Ex. 87.  
Godolph. 1.  
10. 21 Vin.  
Abr. 141.  
2 Prec. Chan.  
44.

b Harg. Co.  
Litt. 133.

c 2 Bl. Com.  
499. 4 Bl. Com.  
380, 381. Bac.  
Abr. tit. Out-  
lawry. 2 Hale  
P. C. 207. Go-  
dolph. p. 119.  
12. l. 5.

Nor

Nor shall the will of a *felo de se*, so far as it respects goods and chattels, have any operation; for they are forfeited by the act and manner of his death; but he may devise his lands, for of them no forfeiture is incurred<sup>a</sup>. As may also a party, guilty of felony, not punishable with death, for he forfeits only his goods and chattels<sup>b</sup>.

<sup>a</sup> Plowd. 261.

Swinh. 106.

<sup>b</sup> 4 Fac. Abr.

247.

d 4 Bl. Com.

97. Co. Litt.

391.

Outlaws also, though merely in civil cases, are intestable, in respect to their personal property, while their outlawry subsists; for their goods and chattels are forfeited during that time<sup>c</sup>.

<sup>c</sup> Fitzh. Abr.

tit. Descent, 16.

1 Salk. 109.

As for persons, guilty of other crimes inferior to felony, as usurers and libellers, they are not precluded from making testaments<sup>d</sup>; nor, as it seems, is a party excommunicated<sup>e</sup>.

<sup>d</sup> Godolph.

p. 1. c. 12.

<sup>e</sup> Off. Ex. 17.

An alien, with whose country we are at war, if he have not the king's license to reside here, express or implied, is, by our law, incapable of making a will; but, if he have such license, he, as well as an alien friend, may bequeath his personal estate<sup>f</sup>.

<sup>f</sup> 1 Bl. Com.

372. 1 Lutw.

34. Wooddes

374.

Secondly, a will may be avoided, by duly making another of a subsequent date. No will has any operation till after the death of the testator; and, therefore, if there be any such instruments, the last shall vacate all the former<sup>g</sup>. But the republication of a former will, shall supersede one of a later date, and re-establish the first<sup>h</sup>. The

<sup>g</sup> 1 Litt. f. 168.

Perk. f. 418.

<sup>h</sup> Perk. f. 479.

4 Burr. 2312.

Vid. Dougl. 40.

making



making of a subsequent codicil does not invalidate the former, unless it appear to be so intended. Codicils, however numerous, may be all effectual.

1 Swinb. Part. I. f. 5.  
1 Show. 349.

The third mode of avoiding a will is by burning, cancelling, tearing, or obliterating the same, by the testator, or in his presence, and by his direction and consent, or by an express or implied revocation of it.

Although a testator has made a will irrevocable in the strongest terms, yet he is at liberty to revoke it; for he shall not, by his own act or expressions, alter the disposition of law, so as to make that irrevocable, which is of an opposite nature.

m 8 Co. 24.

A will may be expressly revoked by another will, or by a codicil in writing, either of which in case it relate to real property, must, by the statute of frauds, be signed by the deviser in the presence of three or four witnesses declaring the same. But by the same statute no will in writing of personal estate shall be repealed or altered by parol or will uncupative, unless the same be committed to writing in the testator's life, and afterwards read to and allowed by him, and proved so to be by three witnesses at the least.

n Vid. Doug. 35. 1 P. Wms. 343.

A will, whether of the former or the latter kind of property, may be revoked also by implication; if a testator, after the making of his will, marries, and hath a child, this is a constructive revocation of the will which he made in a state of celibacy;



Lord Raym.  
441. P. Wms.  
204.

5 Term Rep.

49.

Brady v.  
Cubitt. Dougl.  
31.

celibacy; so marriage, and the birth of a posthumous child, afford the same inference; or rather in such cases a tacit condition is presumed to have been annexed to the will at the time of making it, that the party did not then intend that it should take effect if a total change should happen in the situation of his family. But the presumption, like all others, may be rebutted by every sort of evidence.

4 Co. 60. 2.  
P. Wms. 624.  
2 Term Rep.  
695.

If a single woman make a will, her subsequent marriage shall alone revoke it; nor shall it be revived by the death of her husband.

2 Wooddes  
373. Yet it is  
so laid down by  
De Grey  
C. J. 3 Will.  
516. See vid.  
5 Term Rep.  
52. in not.  
5 Term Rep.  
51. in not.

But it has never been decided, that the marriage of a man, without the birth of issue, shall amount to a revocation. The subsequent birth of a child shall not, of itself, have that effect.

CHAP.

## CHAP. II.

### OF THE APPOINTMENT OF EXECUTORS.

#### SECT. I.

*Who may be an executor—who not—how he may be appointed.*

**A**N executor is he, to whom the execution of a last will and testament of personal estate, is by the testator's appointment confided<sup>a</sup>.

<sup>a</sup> Off. Ex. 2.  
2 Bl. Com.  
503.

In general, all persons are capable of sustaining this character; but there are some exceptions, which I shall presently mention.

The king, it seems, may be appointed an executor, but in that case, as he is presumed to be so engaged in public affairs, as to have no leisure to attend to the private concerns of individuals, he has a right to nominate persons to execute the trust for him, as well as auditors to whom such nominees shall account<sup>b</sup>.

<sup>b</sup> 3 Rep. Abr.  
5. 11 Vin. Abr.  
54. 4 Inst. 335.

It was formerly a doubt, whether corporations aggregate could be constituted executors, inasmuch as they cannot take an oath for the due execution of the office<sup>c</sup>; but it now seems settled in the affirmative<sup>d</sup>, and that on their being so named, they may appoint persons styled Syndics, to receive administration<sup>e</sup>.

<sup>c</sup> Off. Ex.  
17. 1 Bl.  
Com. 477.  
<sup>d</sup> 1 Roll. Abr.  
915. Swinh. 5.  
<sup>e</sup> 1. 3 Rep.  
Abr. 5. 11  
Vin. Abr. 1406.

e 1 Bl. Com.  
28 n. 3. Bac.  
Abr. 5.

f Godolph. 85.  
3 Bac. Abr. 5.

g Off. Ex. 214.  
3 Bac. Abr. 8.  
h Bl. Com. 503.

h Godolph.  
102. 3 Bac.  
Abr. 8.

i Off. Ex. 214.  
31 Vin. Abr.  
99.

j 3 Bac. Abr.  
9. Off. Ex.  
203. 3 Bl.  
Com. 503.  
See vide  
1 Fonbl. 86.

k Off. Ex. 215.

l Off. Ex. 15.  
3 Bac. Abr. 6.

m 1 Bac. Abr.  
6. 157. Co.  
Litt. 129 b.  
Salk. 46 pl. 1.  
Ld. Raym. 282.  
Lutw. 34.

n Off. Ex.  
16. 3 Bac. Abr.  
5. Co. Litt.  
128.

o Swinb. 5.  
1. 1. 3 Bac.  
Abr. 5. Roll.  
Abr. 9. 5.  
11 Vin. Abr.  
141.

ministration with the will annexed, who are sworn like all other administrators. Such corporations as can take the oath of an executor are clearly competent.

An infant may be appointed an executor<sup>a</sup>, and even a child *in ventre sa mere*, and then if the mother be delivered of two or more children at the birth, they shall all be entitled<sup>b</sup>. But an infant, although appointed, is by stat. 38 Geo. 3. c. 87. s. 6. disqualified from acting in the executorship, till he attains the full age of twenty-one years, and an administrator is substituted to act for him in the interval. Before the passing of this act, the law deemed him capable of executing the trust at the age of seventeen<sup>c</sup>.

A feme covert is also capable of the office of executrix, but not without the consent and concurrence of her husband<sup>d</sup>; and although she be an infant, if her husband be of age and assent, he shall have the execution of the will<sup>e</sup>.

An alien friend may be an executor<sup>f</sup>, and so also may an alien enemy, who came here with a safe-conduct, or is commorant here by the king's license, and under his protection, although he came without a safe conduct<sup>g</sup>. Neither outlawry, nor attainder, incapacitates a party, for he acts *inter droit*, and for the benefit of the deceased<sup>h</sup>. Nor had villenage, during his existence in this country, that effect<sup>i</sup>.



Nor is poverty, nor even insolvency, a disqualification of him in whom the testator has chosen to repose so great a confidence.

A disability, however, may arise in various modes, either from the party's being guilty of certain offences against the established religion; or from his being the subject of an enemy's country, and resident within it, or resident here without the king's license; or from a defect of understanding.

A person excommunicated is suspended from acting till absolution. By stat. 3 Jac. 1. c. 5. s. 22. a popish recusant, convicted at the time of the testator's death, is altogether incompetent.

By stat. 3 Car. 1. c. 2. s. 1. if any person send of another abroad, to be educated in the popish religion, or to reside in any religious house abroad, for that purpose, or contribute to his maintenance when there, both the sender, the sent, and the contributor, are subject to the same disability. But by virtue of the stat. 31 Geo. 3. c. 32. Roman Catholics, who shall make, take, and subscribe the declaration of their religious profession, and the oath of allegiance and abjuration, as appointed by that act, shall be exempt from this, as well as from other disabilities.

By stat. 9 & 10 W. 3. c. 32. persons denying the Trinity, or asserting that there are more Gods than one, or denying the Christian religion to be true,

p 3 Bac. Abr.  
7. Salk. 36.  
pl. r. 199 pl.  
11. Lord  
Raym. 367.  
11 Vin. Abr.  
143. 3 P.  
Wms. 332.  
Note B.

9 Off. Ex.  
17. 107.  
3 Bac. Abr. 6.  
2 Burn's Eock  
Law, 221.  
r 1 Show. 293.  
11 Vin. Abr.  
244. 244.  
See 4 Bl. Com.  
56. & Stat.  
3 Jac. 1 c. 5.  
1 10. & 30  
Car. 2. Stat. 2.  
c. 1.



true, or the Holy Scriptures to be of divine authority; shall, for the second offence, among other incapacities, be disabled from being executors.

1 Stat. 25 Car.

2. c. 2. 1 Geo.

1. Stat. 2. c.

13. Vide also

13 W. 3. c. 6.

f. 6.

Also; by the statutes prescribing the qualifications for offices, persons not having taken the oaths and complied with the other requisites for qualifying, who shall execute their respective offices after the time limited for the performance of those acts, shall incur the same incapacity.

Alienage with relation to a hostile country, accompanied with residence abroad, or residence here without the king's permission, either express or implied, is to be classed as a species of disability; for, although the cases in respect to the incapacity of alien enemies are not entirely uniform; yet this principle of exclusion, thus modified, seems clearly to exist.

a 3 Bac. Abr.

6. 1 Bac. Abr.

5. 137. Cro.

Eliz. 683.

Moore 431.

Carter 49, 191.

Skin. 370.

Molloy, lib. 3.

c. 2. f. 10.

Off. Ex. 15. Cro.

Eliz. 142.

a Lord Raym.

282. Str.

1082.

Brandon v.

Nesbitt.

6 Term Rep.

23. Bristow v.

Towers.

6 Term Rep.

35.

a 3 Bac. Abr.

7.

Idiots, and those who are visited with insanity, or whose intellects are destroyed by age, disease, or intemperance; such persons as having been born blind and deaf, have always wanted the common inlets of knowledge, are all necessarily incapable of the office.

The authority of an executor, as appears by the definition, is grounded on the will, and may be either express, or implied; absolute, or qualified; exclusive, or in common with others.

## II. OF APPOINTING EXECUTORS.

15

He may be expressly nominated either by a written or by a nuncupative will<sup>1</sup>.

1 Off. Ex.  
2 3 Bac.  
Abr. 28. 11  
Vin. Abr. 136.

He may be constructively appointed merely by the testator's recommending or committing to him the charge of those duties which it is the province of an executor to perform, or by conferring on him those rights which properly belong to the office, or by any other means from which the testator's intention to invest him with that character may be distinctly inferred. As if a will directs that A. shall have the testator's personal property after his death, and after paying his debts shall dispose of it at his own pleasure; or declares that A. shall have the administration of the testator's goods; this alone constitutes A. an executor according to the law. So, where the testator, after giving various legacies, appointed that his debts and legacies being paid, his wife should have the residue of his goods, on condition that she gave security for the performance of his will: this was held to be sufficient to make her executrix. And so where an infant was nominated executor, and A. and B. interseers, with this direction, that they should have the controul and disposition of the testator's effects, and should pay and receive debts till the infant came of age; they were held to be executors in the mean time<sup>2</sup>.

3 2 Bl. Com.  
503.  
Off. Ex. 2, 9.  
Dyer 90. 3.  
Bac. Abr. 27.  
11 Vin. Abr.  
136. Godolph.  
83. Com. Dig.  
Administra-  
tion (B.)  
10 Cro. Eliz. 48.  
Ambl. 364.

His appointment may be either absolute or qualified. It is absolute when he is constituted certainly, immediately, and without any restriction in regard

He

to the testator's effects or limitation in point of time. It may be qualified, as where A. is appointed to be executor at a given period after the testator's death, or where he is appointed executor on his coming of age, or during the absence of J. S.; or where A. and B. are made executors, and B. is restricted from acting during A.'s life; or where A. and B. are named executors, and if they will not accept the office, then C. and D. are substituted in their room; or where A. is appointed executor on condition that he gives security to pay legacies, or generally to perform the will. So a testator may make A. an executor in respect to his plate and household goods, B. in respect to his cattle, C. as to his leases, and D. in regard to his debts; or appoint A. an executor for his effects in one county, and B. executor for his effects in another, or (which seems more rational and expedient) he may divide the duty where his property is in various countries. So he may nominate his wife executrix during the minority of his son, or so long as she continues a widow\*.

\* Off. Ex. 10—  
12. 3 Bac. Abr.  
28—30.  
11 Vin. Abr.  
136. 138. 39.

Lastly, an executor may be appointed solely, or in conjunction with others; but in the latter case they are all considered by the law in the light of an individual person\*.

\* 3 Bac. Abr.  
30. Off. Ex.  
96.



## S E C T. II.

Of an executor de son tort—how a party becomes so.

HAVING thus treated of executors regularly constituted, I proceed now to the consideration of another species of them, who derive no authority from the testator, but who assume the office by their own intrusion and interference. Such a one is styled an executor *de son tort*, or an executor of his own wrong.

Various are the acts which constitute an executor of this description<sup>a</sup>; such as his taking possession of and converting the assets to his own use<sup>b</sup>; paying the deceased's mortgages, or other debts or legacies out of them; suing for, receiving, or releasing the debts due to the estate<sup>c</sup>; seizing a specific legacy without the assent of the lawful executor<sup>d</sup>; entering on a lease or term for years<sup>e</sup>, or an estate *pur autre vie*<sup>f</sup>, (which is made assets by stat. 29 Car. 2. c. 3.) especially, if he enter in right of the deceased, and does acts on the land, which belong to the office of an executor, as turning the cattle upon it; delivering to the widow more apparel than is suitable to her rank<sup>g</sup>; answering in the character of an executor to any action brought against him, or pleading any other plea than *non quod executor*<sup>h</sup>. And all other acts of a similar nature, however slight<sup>i</sup>, may have the same consequence, as in one case, merely taking a bible,

C

and

<sup>a</sup> Off. Ex. 174.<sup>b</sup> 3 Bac. Abr. 20.

Swinb. 6. f. 22.

N<sup>o</sup> 2. 2 Bl.

Com. 507.

<sup>c</sup> 11 Vin. Abr.

210.

<sup>d</sup> 3 Bac. Abr.

21. 11 Vin.

Abr. 205.

<sup>e</sup> 3 Co. 33. b.

Off. Ex. 172.

<sup>f</sup> 11 Vin. Abr.

210, 211.

<sup>g</sup> Swinb. 6.f. 22. N<sup>o</sup> 2.

Dyer 105.

Roll. Abr. 912.

<sup>h</sup> 3 Bac. Abr.

21. Godolph.

91.

<sup>i</sup> Swinb. 6.f. 22. N<sup>o</sup> 2.<sup>j</sup> 3 Bac. Abr. 22.

e Carth. 166.

<sup>k</sup> Off. Ex. 175.<sup>l</sup> 3 Bac. Abr.

21. Godolph.

92.

<sup>m</sup> 3 Term

Rep. 100. Dyer

266 b. 11 Vin.

Abr. 212.



1, 3 Bac. Abr.  
24. Noy. 69.

Off. Ex. 174.

k Off. Ex. 175.  
11 Vin. Abr.  
209.

and in another a bedstead<sup>l</sup>, were held sufficient, inasmuch as they are the *indicia* of the person so interfering being the representative of the deceased. So if J. S be appointed by the ordinary to collect the effects, and he exceed his authority, and sell any of them, even such as are perishable<sup>j</sup>; or if he had the express direction of the ordinary for such sale, the same being illegal, he becomes an executor *de son tort*<sup>k</sup>.

So where A. the servant of B. sold goods of C. an intestate both before and after C.'s death, in consequence of orders given by him in his life-time and paid the money arising from such sale into the hands of B.; and D. had also, in the capacity of a servant, sold other goods of the intestate, on an action brought against B. and D. as executors for a debt due from the deceased, they not having discharged themselves by payment of the money which they had respectively received to the rightful administrator at the time when the action was commenced, or even when they pleaded, were both adjudged liable as executors of their own wrong<sup>l</sup>.

1 Padget v.  
Priest et al.  
2 Term Rep.  
97.

So where a creditor took an absolute bill of sale of the goods of the debtor, but agreed to leave them in his possession for a limited time, before the expiration of which the debtor died, and the creditor took and sold the goods; he was held liable to the extent of their value, as executor *de son tort*, for the debts of the deceased<sup>m</sup>.

m Edwards v.  
Harben, 2  
Term Rep.  
387.

So by stat. 43 Eliz. c. 8. if administration by fraud be granted to an insolvent person, who gives any of the effects to A. or releases a debt due from him to the intestate, A., for so much, shall be executor *de son tort*.

*Vid. Off. Ex.*  
182, 183.

But there are many acts which a stranger may perform without incurring the hazard of being involved in such an executorship<sup>o</sup>; such as locking up the goods; directing the funeral, in a manner suitable to the estate which is left, and defraying the expences of such funeral himself, or out of the deceased's effects<sup>p</sup>; making an inventory of his property<sup>q</sup>; advancing money to pay his debts or legacies<sup>r</sup>; feeding his cattle; repairing his houses; providing necessaries for his children<sup>s</sup>; for these are offices merely of kindness and charity.

*o* 3 Bac. Abr.  
22. Godolph.  
93, 94.

*p* Off. Ex. 174.  
Swinb. 6. f. 22.  
N<sup>o</sup> 2. 2 Bl.  
Com. 507. 11  
Vin. Abr. 207.

*q* Swinb. *ibid.*

*r* 3 Bac. Abr.  
22. Godolph.  
92.

*s* Swinb. *ibid.*

And, although, as I have stated, a party may be executor *de son tort* of a term actually subsisting, and in that case cannot enlarge his estate by claiming a fee; yet if he enters generally on lands, of which there is no term in being, he cannot qualify his wrong by expressly claiming only a particular estate, but must be a disseisor in fee, and not an executor *de son tort*. Nor can there, generally speaking, be such an executor, when there is a rightful executor; or where administration has been duly granted; for, if after probate of the will, or administration granted, a stranger take possession of the property, he may be sued as a trespasser by the executor or administrator; but it

*t* 3 Bac. Abr.  
23, 24. 3 Lev.  
312, 33. 3 Mod.  
90. 2 Show.  
457.

is otherwise if, after taking such possession, he claims to be executor, pays or receives debts, or pays legacies, or otherwise intermeddles in that character<sup>a</sup>; for, in all those cases, he becomes an executor of his own wrong.

<sup>a</sup> 3 Bac. Abr.  
22. 5 Co. 33 b.  
Bul. 313. pl.  
39. 11 Vin.  
Abr. 212.

Whether a man has made himself such an executor, is a question not to be left to a jury, but is a conclusion of law resulting from the facts established in evidence<sup>x</sup>.

<sup>x</sup> 2 Term.  
Rep. 99.

### S E C T. III.

#### *Of the renunciation or acceptance of an executorship.*

AN executor may, if he pleases, decline to act, but he has no power to assign the office<sup>a</sup>. On his being cited by the ordinary, pursuant to stat. 21 H. 8. c. 5. to come in and prove the will, if he neglect to appear, he is punishable by excommunication for a contempt<sup>b</sup>. If he appear, either on citation or voluntarily, and pray time to consider whether he will act or not, the ordinary may, though the practice seems now obsolete, grant letters *ad colligendum* in the interim<sup>c</sup>: If he refuse, he cannot be compelled to accept the executorship, and his renunciation is entered and recorded in the spiritual court before the ordinary. A refusal, by any act *in pais*, as a mere verbal declaration to that effect, is not sufficient; but, to give

<sup>a</sup> 3 Bac. Abr.  
42.

<sup>b</sup> Off. Ex. 37.

<sup>c</sup> Cro. Eliz. 92.



It validity, it must be thus solemnly entered, and recorded, and then administration with the will annexed will be granted to another <sup>d</sup>.

d Off. Ex. 38.  
4 Burn. Eccl.  
L. 198 Swinb.  
6 f. 12. Roll.  
Abr. 907.

If the executor refuse to take the usual oath, or, being a quaker, to make the affirmation, this amounts to a refusal of the office, and shall be so recorded <sup>e</sup>.

e 4 Burn. Eccl.  
L. 213. Ld.  
Raym. 363.

In case the ordinary himself is nominated executor, he may renounce before the commissary <sup>f</sup>.

f Off. Ex. 38.

If a party renounce in person, he takes an oath, that he has not intermeddled in the effects of the deceased, and will not intermeddle therein with any view of defrauding the creditors. But he may renounce by proxy, and then the oath is dispensed with.

An executor cannot in part refuse; he must refuse entirely, or not at all <sup>g</sup>.

g 11 Vin. Abr.  
139. Crownl.  
82. 1 Salk. 297.

After such refusal, and administration granted, the party is incapable of assuming the executorship <sup>h</sup> during the lifetime of such administrator; but, after the death of the administrator, the executor may retract his renunciation, however formally made; but if administration be committed in consequence merely of his failure to appear on the above mentioned process, he has a right, at any future time, even in the administrator's lifetime, to come in and prove the will <sup>i</sup>.

h Swinb. 6. f.  
12. 3. Rec.  
Abr. 42, 43.  
Off. Ex. 39.

i Off. Ex. 114.  
Com. Dig. Ad.  
If mod. (D. 4.)



If he appear, and take the usual oath before the surrogate, he has made his election, and cannot afterwards divest himself of the office, but may be compelled to perform it<sup>2</sup>.

1 Swinb. 6. f.  
12. 1 Vent.  
335. 11 Vin.  
Abr. 207.

14 Burn's  
Eccl. L. 198.  
Swinb. 6. f. 12.  
Salk. 301, 304,  
307.

m Vid. infr.

So if he once administers he is absolutely bound, and by stat. 37 Geo. 3. c. 90. s. 10. if he administer, and omit to take probate within six months after the death of the deceased, he is liable to the penalty of fifty pounds<sup>m</sup>.

n 3 Bac. Abr.  
44. Roll. Abr.  
917. 11 Vin.  
Abr. 205.

o 3 Bac. Abr.  
44. Roll. Abr.  
917.

p Roll. Abr.  
917. 11 Vin.  
Abr. 206.

q 3 Bac. Abr.  
44. Roll. Abr.  
917.

r Roll. Abr.  
917. 11 Vin.  
Abr. 206.

The acts which amount to an administration are all such as indicate an election of the executorship<sup>n</sup>, and within this class all such acts as constitute an executor *de son tort* are of course comprehended<sup>o</sup>. Hence it hath been adjudged that if he take the goods of a stranger, under an idea that they belonged to the testator, and with an intent to administer them, this act is sufficient to charge him; as, where the testator was tenant at will of certain goods, and the executor seized them, supposing they were part of the deceased's effects, and intending to administer them, this was held to be an election of the office<sup>p</sup>. But it is otherwise if the executor takes the testator's goods on a claim of property in them himself, although it afterwards appear that he had no right, since such claim is expressive of a different purpose from that of administering as executor<sup>q</sup>. So if an executor sequester goods in the character of a commissary, that is no assent to the executorship<sup>r</sup>.

But if there be two executors, and one of them hath a specific legacy bequeathed to him, and takes possession of it without the consent of his co-executor, such act amounts to an administration. So if an executor hath refused before the ordinary, and administration hath been granted, if it appear he had administered before, and thus determined his election, the letters of administration may be revoked, and he may be enforced to prove; Roll. Abr. 917. 11 Vin. Abr. 206.

Off. Ex. 49.

If there be several executors, they must all duly renounce before administration with the will annexed can be granted.

Roll. Abr. 997.

If some of them renounce before the ordinary, and the rest prove the will, the renunciation is not peremptory; such as refused may, at any subsequent time, come in and administer, and although they never acted during the lives, they may assume the execution of the will after the death, of their co-executors, and shall be preferred before any executor appointed by them. And if administration be committed before a refusal by the surviving executor, such administration will be void.

5 Co. 28.  
9 Co. 36.  
Dyer 160.  
Salk. 311. pl.  
15. 3 P. Wms.  
251. Vid. also,  
Burr. 1463. &  
1 Bl. Rep. 456.  
8 C. 11 Vin.  
Abr. 55. 66.  
w Salk. 308.

## S E C T. IV.

*Of an executor before probate of the will.*

As a consequence of the principle that an executor derives all his title from the will, his interest is completely vested at the instant of the testator's death, and therefore before probate, that is, before the will is authenticated in the spiritual court, and a copy of it delivered to him, certified under the seal of the ordinary, he may lawfully perform almost every act which is incident to the office<sup>a</sup>. Not to mention the funeral, he may make an inventory, and possess himself of the testator's effects<sup>b</sup>: he may enter peaceably into the house of the heir, and take specialties and other securities for the debts due to the deceased<sup>c</sup>; or remove his goods<sup>d</sup>: he may pay or take release of debts owing from the estate: he may receive or release debts which are owing to it<sup>e</sup>: he may sell, give away, or otherwise dispose, at his discretion, of the goods and chattels of the testator<sup>f</sup>: he may assent to or pay legacies<sup>g</sup>; he may enter on the testator's term for years<sup>h</sup>: he may commence actions in the right of the testator, as for trespass committed, or goods taken, or on a contract made in the testator's life-time, although he cannot declare before probate, since, in order to assert such claims in a court of justice, he must produce the copy of the will, certified under seal as above mentioned, or, as it is sometimes styled, the letters testamentary; but when produced, they shall

a Com. Dig.  
Admon. B.  
9. Plowd.  
Com. 280.  
1 Term Rep.  
480. 3 Bac.  
Abr. 52. Off.  
Ex. 34. 11  
Vin Abr 202.  
1 Salk. 299.  
b Off. Ex. 34.  
c Off. Ex. 34.  
d Off. Ex. 92.  
Vid. infr.  
e Off. Ex. 35.  
f Off. Ex. 35.  
g Off. Ex. 35.  
h Vin. Abr.  
204.  
h 11 Vin. Abr.  
203.



all have relation to the time of suing out the writ<sup>1</sup>. So if in the same right he file a bill in equity, a subsequent probate shall be equally available<sup>2</sup>; and according to a late case, it seems sufficient if it be obtained at any time before the hearing<sup>3</sup>. So an executor may before probate arrest the debtor to the estate, and shall be justified in that act by the relation of the subsequent grant<sup>4</sup>. But such relation shall not prejudice a third person, and therefore where the debtor, after being arrested by the executor before probate, paid a debt to J.S. and continued two months in prison, he was adjudged not to be a bankrupt from the time of the arrest, so as to invalidate that payment<sup>5</sup>.

An executor may also maintain actions on his own possession, as trespass, detinue, or replevin, for goods or cattle of the testator taken after the testator's death: so if he be intitled as executor to the next presentation to a living, and it become void, he, or his grantee, may maintain a *quare impedit* for it before probate<sup>6</sup>.

So he may maintain actions, as trespass or trover, for such of the effects as never came into his actual possession, taken or converted after the testator's decease<sup>7</sup>. So he may maintain actions on contracts either actually made with him subsequent to that event, or arising by legal implication, as assumpsit for the goods sold by him<sup>8</sup>, or for money due to the testator, received by the defendant after the testator's death<sup>9</sup>. In all such cases, the causes

i 11. Vin. Abr. 202, et. seq. Com. Dig. Admon. B. 9. Off. Ex. 36. 3 Bac. Abr. 53. k 3 P. Wms. 351.

l Parten, executrix, v. Panton, 1793. cited 3 Bac. Abr. 53. m Off. Ex. Suppl. 103. Roll. Abr. 917.

n 11 Vin. Abr. 204. 3 Bac. Abr. 53. Com. Dig. Admon. B. 9. 3 Lev. 57. skinn. 22. 87. Cooke's Bankrupt Laws, 4 edit. 94.

o 11 Vin. Abr. 203. Off. Ex. 36.

p 3 Bac. Abr. 53. Off. Ex. 36. Com. Dig. Pleader: O. 14. Dyer 135.

q 3 Bac. Abr. 53. Carth. 154. r Off. Ex. 36. 37 in not. 1. Vent. 109. Bollard v. Spencer, 7. Term Rep. 358. Ca. Temp. Hardwick. 204. Cockerill v. Kynaston, 4 Term Rep. 277.

s 14 Rayn. 436.

of



1. s. Term Rep.  
477.

2. 1 Salk. 302.  
307. 7 Term  
Rep. 359.

v. Off. Ex. 35.  
11 Vin. Abr.  
204. Dyer 367.

w Com. Dig.  
Admon. B. 9.  
Pl. Com.  
280 b. 11 Vin.  
Abr. 205.  
2 Vern. 49.  
Off. Ex. 37.

x. Off. Ex.  
Suppl. 74. 75.  
182. 11 Vin.  
Abr. 68. 90.

y. Com. Dig.  
Admon. B. 9.  
Ca. Ch. 265.  
11. Vin. Abr.  
56.

of action arise subsequent to the attaching of the plaintiff's right, and therefore he need not describe himself as executor, and consequently no profert of the letters testamentary is requisite. So where a reversion for years is vested in him in that character, he may avow without probate for the rent which accrued after the testator's death, but not for such as accrued before.

Such are the acts, which an executor, although the will has not received the sanction of the spiritual court, is warranted in performing, and which his death before probate will not annul.

On the other hand, if he has elected to administer, he may also before probate be sued at law or in equity, by the deceased's creditors, whose rights shall not be impeded by his delay, and to whom, as executor *de jure* or *de facto*, he has made himself responsible.

If an executor die before probate, he is considered in point of law as intestate in regard to the executrix, although he have made a will, and appointed executors; and although he die after taking the oath, if before the passing of the grant.

If A. be executor for a certain period, and be nominated executor for the time subsequent, and A. prove the will; after the time is expired B. may sue without another probate.

SEC

S E C T. V.

*the probate.—Jurisdiction of granting the same  
—of bona notabilia.*

I PROCEED now to consider the probate of a will. The jurisdiction of proving wills consequent, will be hereafter shewn, on the power of granting administrations, regularly belongs to the bishop of the diocese, or the metropolitan of the province, in which the parties resided at the time of their death<sup>a</sup>. But if a testator die within some peculiar jurisdiction, which is either regal, archiepiscopal, episcopal, or archidiaconal; in each of these the owner hath of common right the power of granting probate. This privilege is founded on the notion of an original composition between each owner and the ordinary of the diocese for that purpose<sup>b</sup>.

a 3 Bac. Abr.  
34. 39. Com.  
Dig. Admon.  
B. 6. 4. Burn.  
Eccl. L. 188.

Courts baron which have had the probate of wills from time immemorial, and have always continued that usage, are also intitled to this species of jurisdiction. But they can claim it only by prescription<sup>c</sup>.

b 3 Bac. Abr.  
39. Salk. 40. 41.  
11 Vin. Abr.

By custom also the probate of wills of burgesses belongs to the mayors of some boroughs in respect of lands devisable within the same, yet as to personal property, the will must be proved before the ordinary<sup>d</sup>.

c 3 Bac. Abr.  
39. Off. Ex. 44.  
Salk. 41. Cowp.  
286.

d 3 Bac. Abr.  
40. Off. Ex. 45.  
Off. Ex. Suppl.  
10.

But

But in general, a probate can be granted only in the court of the ordinary, or of the metropolitan.

If all the effects at the time of the testator's death lie within one diocese, the executor ought regularly to appear before the bishop or his surrogate, and prove the will.

But if the testator hath left *bona notabilia*, or effects to the value established by 92 canon *Jac.* 1, namely a hundred shillings in two distinct dioceses, or in several peculiars within the same province; then the will must be proved before the metropolitan, by way of special prerogative<sup>e</sup>; whence the court where the validity of such wills is tried, and the office where they are registered, are called the prerogative court and the prerogative office, of the provinces of Canterbury and York<sup>f</sup>. So if there are *bona notabilia* in those several provinces, the archbishops shall in each of them grant probate according to the *bona notabilia* in their respective provinces. Each of them has supreme jurisdiction, and neither can act within the province of the other<sup>g</sup>. If there are *bona notabilia* in different dioceses of one province, and in one diocese only of the other, in respect to the former, the archbishop shall have the probate, in respect to the latter the particular bishop<sup>h</sup>.

e 2 Bl. Com.  
509. 3. Bac.  
Abr. 36.  
Com. Dig.  
Adm. or. B. 3.  
Off. Ex. 45. 48.  
4 Burn. Eccl.  
L. 191.  
Roll. Abr. 909.  
11 Vin. Abr. 79.  
f 2 Bl. Com.  
509. 11 Vin.  
Abr. 36. pl. 7.

g 3 Bac. Abr.  
36. 1 Salk. 39.  
2 Lev. 86. 11  
Win. Abr. 76.  
pl. 15.

h Off. Ex. 48.



So if the testator, not in *itinere*, die in one diocese, not having any goods there, but having *bona notabilia* in another diocese, the archbishop shall grant the probate <sup>1</sup>.

1 3 Bac. Abr. 36.  
Roll. Abr. 909.  
4 Burn. Eccl.  
L. 189. 11  
Vin. Abr. 80.

So if the goods be in several peculiars of a bishop's diocese, in that case probate shall not be granted by him, but by the metropolitan, inasmuch as peculiars are exempt from ordinary jurisdiction <sup>2</sup>.

But where the testator dies possessed of goods in the diocese of an archbishop, and in a peculiar of the same diocese, there must be several probates: the archbishop shall have no prerogative, because the peculiar was derived out of his episcopal jurisdiction <sup>3</sup>. By the canon 92 *Jac.* 1.

4 Burn. Eccl.  
L. 191. 11 Vin.  
Abr. 80.

By the canon 92 *Jac.* 1. above referred to, goods which a man has with him, who dies in *itinere*, shall not make *bona notabilia* <sup>4</sup>; but if a man have two houses in different dioceses, and resides chiefly at one, but sometimes goes to the other, and being there for a day or two, dies, leaving no *bona notabilia* in the first mentioned house, probate shall be granted by the bishop of the diocese in which the testator died, or he was commorant there, and not there as a traveller <sup>5</sup>.

1 4 Burn. Eccl.  
L. 191. Cro. El.  
719. Vid. 3 Bl.  
Com. 380.  
m Vid. Off. Ex.  
Suppl. 27.

2 4 Burn. Eccl.  
L. 191. 1 Salk.  
37.

If there are *bona notabilia* in England and Ireland, several probates shall be granted by the archbishop or bishop in England, and the archbishop or bishop in Ireland, as the case may require <sup>6</sup>. The probate of a bishop's will, although he had goods only in his own jurisdiction, belongs to the archbishop

3 3 Bac. Abr.  
36. Dyer 305.  
Roll. Abr. 908.



p 3 Bac. Abr.  
37. 4 Inst. 335.

b 3 Bac. Abr.  
36. Roll. Abr.  
908.

r 3 Bac. Abr.  
36. 4 Burn.  
Fecl. L. 193.  
Of. Ex. Suppl.  
27. 11 Vin.  
Abr. 75. 80.

a 3 Bac. Abr.  
37.

a Bac. Abr. 37.  
Godolph. 69.

3 Bac. Abr.  
37. Godolph.  
69.

v. 4 Burn Fecl.  
L. 189. Roll.  
Abr. 908, 909.

bishop of the province. If the testator died beyond sea, although the goods be in one diocese only, the archbishop is to grant the probate. If the probate be granted by a bishop or inferior judge when it does not belong to him, it is void; but if it be granted by the metropolitan when it does not belong to him, it is only voidable, and is of force till reversed by sentence, for he hath jurisdiction over all the dioceses within his province.

In the above mentioned canon, *fac. 1.* there is a provision, that the jurisdiction of those dioceses shall not be prejudiced where, by composition, or custom, *bona notabilia* are rated at a greater sum, as in London, where by composition they are rated at amount to ten pounds.

Nor is it necessary that the deceased should have left effects to the value of five pounds in each of the several dioceses where they are dispersed; if there be effects in any one diocese other than that in which he died to the amount of five pounds, they constitute *bona notabilia*. But if the goods in the diocese where he died are of the value of ten pounds, or upwards, and he hath not left goods amounting to five pounds in another diocese, they shall not be denominated *bona notabilia*. But if goods are left in two dioceses to the amount of five pounds, in the whole, they shall be *bona notabilia*, and consequently subject to the archbishop's jurisdiction, for in that case neither of the bishops has an exclusive authority. *Bona notabilia* may consist of goods to the value of five pounds, in

the diocese, and a lease or term for years of that value in another, in which the lands lie<sup>u</sup>.

w 3 Bac. Abr.  
37. Com. Dig.  
Admor. B. 4.

Or of debts due to the deceased, however difficult to be collected, or however desperate<sup>z</sup>.

x 3 Bac. Abr.  
47. Com. Dig.  
Admor. B. 4.

So it seems of a debt due from the king, for which there is no remedy but by petition<sup>y</sup>.

y Off. Ex. 46.  
11 Vin Abr 80.

But if there be a bond in the penalty of five pounds, to secure the payment of a less sum, and the same be forfeited, it shall not be classed among *bona notabilia*<sup>z</sup>. And it was so held even antecedent to the statute 4 & 5 Ann. c. 16. s. 13. whereby the penalty is saved on bringing principal, interest, and costs into court.

z Off. Ex. 46

Nor shall lands devised to executors for payment of debts and legacies, although they become assets, be considered as such goods<sup>a</sup>. On this point the law makes a distinction between debts by specialty and debts by simple contract. It regards debts by specialty, as the deceased's goods in that diocese where the securities are found at the time of his death, although they were entered into in another; for the debtor or creditor at the time when they were executed lived in a different diocese<sup>b</sup>. But debts by simple contract follow the person of the debtor, and therefore are esteemed the deceased's effects in that diocese where the debtor resided at the creditor's death<sup>c</sup>. On this principle it hath been holden, that a judgment obtained in one of the

a 3 Bac. Abr.  
37. Off. Ex. 47.  
11 Vin Abr. 80.

b 3 Bac. Abr.  
37. Off. Ex. 46.  
Roll. Abr. 909.

c 3 Bac. Abr.  
38. Off. Ex. 47.

the courts at Westminster, although in an action laid in Dorsetshire, made *bona notabilia*, because the record was at Westminster; but that a debt on a bill of exchange followed the person of the debtor<sup>d</sup>.

d 1 Salk. 40.  
pl. 9. 3 Salk.  
184. Ld Raym.  
854 11 Vin.  
Abr. 77. 80.

e Com Dig.  
Admor. B. 4.  
Dyer 305,  
in not. 11 Vin.  
Abr. 80.

f Com. Dig.  
Admor. B. 4.  
g Com. Dig.  
Admor. B. 4.  
Dyer 305,  
in not.

An annuity out of a parsonage shall be reputed to be property in the diocese where the parsonage lies<sup>e</sup>. And leases for years where the land lies not where the lease is merely found<sup>f</sup>.

Debts on recognizances, statutes, or judgments shall be *bona notabilia* where they were acknowledged or given<sup>g</sup>.

And by statute 4 & 5 Ann. c. 16. s. 26, salary wages, or pay, due to persons for work in any of her majesty's yards or docks, shall not be taken or deemed to be *bona notabilia*, whereby to found the jurisdiction of the prerogative courts.

If the will be not contested, the executor may prove it in the common form by his own oath, and in some of the dioceses of York, with the additional oath of one witness, or in case its validity is called in question, he will be required to substantiate it more solemnly *per testes*, by the examination of witnesses in the presence of the parties interested as the widow and next of kin<sup>h</sup>. This latter mode of proving a will is seldom resorted to, unless in the instance of a party whose object is to oppose it<sup>i</sup>; but the executor himself may, for greater safety

h 3 Bac. Abr.  
39. 2 Bl. Com.  
308. 4 Burn.  
Eccl. L. 205,  
206, 207.  
i 4 Burn. Eccl.  
L. 207.



safety, if he has an interest in the will, elect to have it functioned by this more decisive species of evidence, and call on the next of kin to see it propounded<sup>1</sup>.

<sup>1</sup> 4 Burn Eccl. L. 208.

When a will is to be thus solemnly proved, two witnesses are indispensable; for, generally, by the civil law, the testimony of two persons is requisite, and therefore if in the probate of a will that of one witness is disallowed in the ecclesiastical court, no mandamus will lie, for inasmuch as that court has jurisdiction of the subject matter, it has so also of the mode of proof, and the proceedings respecting

<sup>1</sup> 4 Burn Eccl. L. 206. Roll. Abr. 300.

It is not necessary that such witnesses should have read the will, or heard it read, if they can depose that the testator declared that the writing produced was his last will and testament<sup>1</sup>, or duly executed the same, in their presence.

<sup>1</sup> 4 Burn Eccl. L. 205. Godolph. 66.

If the will or codicil be written in the testator's hand-writing, although it have neither his name subscribed, nor his seal affixed to it, nor had witnesses present at its publication, yet it is of sufficient validity on proof of the hand-writing<sup>m</sup>, by the evidence of two persons acquainted with the character of it from having seen him write; but in case there be a single subscribing witness to the will, and who appears to attest it, the testimony of one person only to the above-mentioned effect is requisite.

<sup>m</sup> 2 Al. Com. 302.

D

So,



So, although written by another hand, nor even signed by the testator, if it can be shewn to be according to his instructions, and read over, and approved by him, it is equally effectual.

2 Bl. Com.  
501. Vid. Com.  
Rep. 451.

An executor on taking probate swears, that the writing contains the true last will and testament of the deceased, as far as the deponent knows, or believes, and that he will truly perform the same by paying first the testator's debts, and then the legacies therein contained, as far as the goods, chattels, and credits will thereto extend, and the law charge him; and that he will make a true and perfect inventory of all the goods, chattels, and credits, and exhibit the same into the registry of the spiritual court at the time assigned him by the court, and render a just account thereof when lawfully required.

When the will is proved, the original is deposited in the registry of the ordinary or metropolitan, and a copy thereof, in parchment, is made out under his seal, and delivered to the executor, together with a certificate of its having been proved before him; and such copy and certificate are usually styled the probate.

2 Bl. Com.  
508. 4 Burn.  
Eccl. Law. 215.  
11 Vin Abr. 56.  
pl. 7. Bac. Use  
of the Law, 67.

## S E C T. VI.

*Of the probate of nuncupative wills.*

A NUNCUPATIVE will is also capable of being proved<sup>a</sup>. But by the statute of frauds, after six months from the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the testimony, or the substance thereof, were committed to writing within six days after the making of such will. And no letters testamentary, or probate of any nuncupative will, shall pass the seal of any court till fourteen days at the least after the decease of the testator be fully expired. Nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same if they please. And (as we may remember), no will in writing, concerning any goods, or chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest therein be altered or changed by any words, or will by word of mouth only; except the same be in the life of the testator committed to writing, and after the writing thereof, read to the testator, and allowed by him, and proved to be so done by three witnesses at the last.

<sup>a</sup> 2 Bl. Com. 586.

## S E C T. VII.

*Of the probate of the wills of seamen, and marines.*

IN regard to the making and probate of the wills of petty officers and seamen in the king's service, and of non-commissioned officers of marines and marines, serving on board a ship in the king's service, by the statutes 26 Geo. 3. c. 63. and 34 Geo. 3. c. 34. above referred to<sup>a</sup>, no will made by any person of such description, whereby any wages, pay, prize money, or allowance of money of any kind due for such service is bequeathed, shall be valid, unless, if made while the party is in the service it be signed before, and attested by the captain or the officer then commanding, and one of the fighting officers of the ship to which the party belongs; and unless it specify in the body thereof the name of the ship, and the number at which the maker of the will stands upon the ship's book, and contain a full description of the residence, profession, or business of the person in whose favour it is made, and the day of the month, and the place where it was executed, or by the agent of any of his majesty's hospitals or quarters appointed to receive sick and wounded seamen, in which the party may be at the time; or, if made by such officer or seaman discharged from the service, within the bills of mortality, unless it be attested by the officer appointed by the treasurer of the navy to inspect such wills

<sup>a</sup> Vid. *supr.* 3, 4.



er, if made at any of the ports where seamen's wages are paid, unless it be attested by the treasurer of the navy's chief or second clerk there; or, if made at any other place, unless it be attested by the minister and churchwardens of the parish in England or Ireland, or by the minister and two elders of the parish in Scotland, where such petty officer, or seaman, and executors shall respectively reside.

And after the will shall be so executed and attested, it shall not be delivered to the party himself, but, if executed abroad, shall be sent by the commander of any of his majesty's ships, or agent of any of his majesty's hospitals or sick quarters, when they transmit their respective returns to the navy and sick and hurt boards, or if executed in Great Britain or Ireland, shall be sent by the commander of any of his majesty's ships, or agents of his majesty's hospitals or sick quarters, treasurer of the navy's clerks, minister of the parish, or whoever of them shall attest such will, by the general post, addressed to the treasurer or paymaster of the navy, at the navy pay-office, London. And the treasurer or paymaster shall immediately deliver over such will to the inspector, who shall immediately on the receipt thereof duly register the same.

And in case he shall see reason to suspect the authenticity of such will, he shall report the same to the treasurer or paymaster of the navy, and shall enter his caveat against such will, which shall prevent

vent any money's being received thereon till the same shall be authenticated to the satisfaction of the treasurer or paymaster; but if such inspector shall see no cause to suspect the will, he shall affix the stamp of his office, and shall issue a check in lieu of such will, shewing the receipt of the same at his office, and mentioning its particular heads, with directions to return the check on the testator's death; to which check shall be subjoined a blank certificate, to be signed by two reputable housekeepers of the parish where the executor is resident at the time such certificate shall be returned, of the identity of the executor, and of his being an inhabitant of the parish; and also another blank certificate, to be signed by the minister of the parish, and two of the churchwardens, or two elders of the same, as the case may be, certifying that such two housekeepers are resident within the parish, and of good repute. And the check must also express, that if the testator dies after he leaves the naval service, a certificate of his burial, or some other authentic proof of his death, must also be sent to the office, and also must desire the executor to nominate a proctor to be employed in obtaining a probate, and direct the above certificates to be filled up on the testator's death, and the check to be sent by the general post under cover, directed to the treasurer or postmaster of his majesty's navy, London. And such check, with the certificates duly filled up, having been returned to the pay office in the event of the testator's death, the inspector shall note on the will the amount of the wages due

ue to the deceased, and shall forward the will to such proctor, together with a letter addressed to the minister and churchwardens, or elders (as the case may be), of the parish within which the executor shall then reside, franked by the treasurer or paymaster, or inspector, and such letter to inclose a commission or requisition and copy of the will, informing such minister of the receipt of the check, and the certificates annexed, attested by him, and the two churchwardens or elders, and requiring him to execute the commission or requisition, by swearing the executor, and when executed, to return it, with a copy of the will, to the pay-office, and to specify and describe the receiver-general of the land tax, the collector of the customs, or of the excise, or the clerk of the check, whose abode is nearest to the executor, when such person will be directed to pay him the wages due to the deceased; and the proctor having received the will, and the letter so written by the inspector, shall immediately sue out the previous commission or requisition, and shall inclose it, together with instructions for executing the same, and a copy of the will in such letter, and shall transmit the letter by the general post, to the minister, churchwardens, or elders; and they immediately on the receipt thereof, shall proceed to the execution of such commission or requisition, and, the same being so executed, shall transmit it to the treasurer or paymaster. And if the executor shall reside at a distance from the place where the wages, prize money, or other allowance due to the deceased, are payable,



payable, they shall specify and describe one of the persons enumerated in the letter, who may reside nearest to the executor. And the treasurer or paymaster shall, immediately on the receipt thereof, send the previous commission or requisition so executed, to the proctor, who in pursuance thereof shall forthwith sue out and procure such probate.

And if any proctor or officer of the ecclesiastical court, shall take more for his charges than the sums by the act directed to be taken in the different events therein specified, he shall forfeit fifty pounds; or if he shall be aiding or assisting in procuring probate of a will, or letters of administration, for the purpose of enabling any person to receive such wages, prize-money, or allowance of money, otherwise than in the manner prescribed by these acts, such proctor or other officer shall forfeit five hundred pounds, and for ever after be incapable of acting in any capacity in any ecclesiastical court in Great Britain.

The provisions of these two acts are extended by statute 2 Geo. 3. c. 67. to petty officers and seamen, non-commissioned officers of marines, and marines, serving or who may have served on board any of his majesty's ships, and who are resident in Ireland.

## S E C T. VIII.

*Of the probate under special circumstances.*

IF the executor be infirm, or live at a distance, it is usual to grant a commission or requisition to the archbishop or bishop, in England or Ireland (as the case may be), or if in Scotland, the West Indies, or other foreign parts, to the magistrates or other competent authority, to administer the oath to be taken previous to granting probate of the will<sup>a</sup>. Otherwise if the executor do not within a reasonable time appear voluntarily, he may, as I have already mentioned, pursuant to the statute 1 H. 8. c. 5. be cited by the ordinary *ex officio*, to *prove or refuse the testament*. In case of non-appearance on the process he may be excommunicated, and the goods of the deceased sequestered until the probate<sup>b</sup>, or administration with the will annexed, may be granted, in pain of his contumacy, provided an intimation to that effect be contained in the process.

<sup>a</sup> Vid. 4 Barn  
Ecl. L. 203.

<sup>b</sup> Vid. 4 Barn  
Ecl. L. 204.

But the practice of issuing such citations is now become obsolete, unless at the suit of the parties interested; if, however, the executor acts and neglects to take probate within six months after the death of the testator, by the above-mentioned statute of 37 G. 3. c. 90. he incurs the penalty of fifty pounds.

On

On the other hand, the ordinary is bound to grant probate of the will, and, if the executor accept the office, and claim the probate, in case of the ordinary's refusal to grant it, a writ *mandamus* may issue from the court of King's Bench to compel him<sup>c</sup>: for although the spiritual court is to determine whether there be a will or not, yet if there be a will, the executor has a temporal right, nor shall any terms be imposed on him except such as the will prescribes<sup>d</sup>. But if the will be litigated, the bishop may in his return to the writ state, that a suit is depending before him in regard to the same, and not yet determined, And such return will be sufficient<sup>e</sup>.

<sup>c</sup> 4 Burn Eccl.  
L. 204.

<sup>d</sup> Ld. Raym.  
361. Stra. 573.

<sup>e</sup> Ld. Raym.  
262. Burr.  
2295. 4 Burn.  
Eccl. L. 203.

This jurisdiction the metropolitan or ordinary may exercise either himself or by his official; for it is merely a ministerial act, and concerns him not in his spiritual capacity<sup>f</sup>.

<sup>f</sup> 3 Bac. Abr.  
39. Cowp. 140.

The power of granting probates is not local but is annexed to the person of the archbishop or bishop; and therefore a bishop or the commissary of a bishop, while absent from his diocese, may grant probate of wills respecting property within the same; or if an archbishop or bishop of a province or see in Ireland happens to be in England he may grant probate of wills relative to effects within his province or diocese<sup>g</sup>.

<sup>g</sup> 3 Bac. Abr.  
39. 11 Vin. Abr.  
78. Cro. Car.  
214.



## II. SPECIAL CIRCUMSTANCES.

If the see be vacant, or in case of the suspension of the bishop or archbishop, the dean and chapter are to grant the probate<sup>a</sup>.

h 3 Bac. Abr.  
39. Roll. Abr.  
908. 11 Vin.  
Abr. 74, 75-77.  
Lutw. 30.

The proving of a bishop's will, although he left goods only within his own jurisdiction, belongs to the archbishop<sup>b</sup>.

i 11 Vin. Abr.  
74. 4 Inst. 324.

If there be several executors, and one takes probate, he takes it with a reservation to the rest. If another applies for that purpose, an engrossment of the original will is to be annexed to the second probate in the same manner as to the first, and in the second grant the first grant is to be recited. And so of the rest. And this is styled a double probate<sup>c</sup>.

k 4 Burn Eccl.  
L. 201.

Where several executors are appointed, as formerly mentioned<sup>d</sup>, with separate and distinct powers, yet as there is but one will, one probate shall be sufficient<sup>e</sup>.

m 3 Bac. Abr.  
30. Off. Ex. 13.

Where probate of the will of a married woman is granted to her executor, if he be not her husband, it is limited to the property over which she had a disposing power, unless the husband, either personally or by proxy, consent to a general probate's being granted to her executor.

If a will be limited to any specific effects of a testator, the probate shall be also limited, and an administration *ceterorum* granted.

The

12 Bl. Com.  
506. Com.  
Dig. Admor.  
B. 6. II  
Vin. Abr. 68.  
90. 107. Off.  
Ex. Suppl. 140.  
Flow. 325.  
in Com. Dig.  
Admor. G.  
1 Leon. 275.

2 Salk. 309.

The interest vested by the will of the deceased in the executor, may, if he take out probate, be continued, and kept alive by the will of the same executor, so that the executor of A.'s executor to all intents and purposes the executor and representative of A. himself<sup>1</sup>, and may be directly named in legal proceedings<sup>m</sup>. For the power of an executor is founded on the special confidence and actual appointment of the deceased. Such executor, therefore, may transmit that power to another in whom he has equal confidence. And so long as the chain of representation is unbroken by any intestacy, the ultimate executor is the representative of every preceding testator, in how ever numerous a succession. Nor is a new probate of the original will in any of the subsequent stages requisite<sup>n</sup>.

If there be several co-executors, and they all prove, the interest goes only to the executor of the last survivor, and although such survivor refused to prove in the life-time of the other executors, he may make out probate after their death, and in that case the interest will be equally transmitted to his executor. But if such surviving executor renounces after their death, administration shall be granted, and then his executor will have no title to the original executorship<sup>o</sup>.

2 Vin. Abr.  
68, 69, 114.  
2 Salk. 307, 311.  
Hard. III.  
Com. Dig.  
Admor. E. 1.

If A. appoint B. and C. his executors, and die, and B. make J. S. his executor, and die, and afterwards C. dies intestate; the executor of B. shall

It be the executor of A. because the executorship  
 vested solely in C. as survivor, and as he died in-  
 state, administration must be taken out to A. P.

p 11 Vin. Abr.  
 88.

Wills which concern the personal estate only,  
 are subject to the jurisdiction of the ecclesiastical  
 courts.

q 4 Burn Eccl.  
 L. 195.

Where the will respects lands merely, the spiri-  
 tal court ought not to grant probate, and if  
 there be a suit to compel it, a prohibition will

r 4 Burn Eccl.  
 L. 195. Cro,  
 Car. 396 a. Ves.  
 junr. 230.

But when the will is of a mixed nature, that is,  
 relates both to real and personal property, the  
 probate of it shall be entire in the spiritual  
 court.

s Cro. Car. 396.  
 11 Vin. Abr.  
 57. 60. 117.  
 2 Salk. 552.  
 3 Salk. 22.

A will may be proved with a reservation as to a  
 particular legacy. And in such case, if there be a  
 decree against such legacy as a forgery, or interpo-  
 sition, in the ecclesiastical court, the will shall be  
 grossed without it, and so annexed to the pro-  
 bate.

t 4 Burn Eccl.  
 L. 209. 1 P.  
 Wms. 322.

The will of a party who has been long absent  
 from this country, may be proved, if he is gene-  
 rally understood to be dead, and the executor will  
 take upon himself to swear that he believes him to  
 be so.

u Off. Ez.  
 Suppl. 63.  
 Swinb. Part 4.  
 If f. 13.



4 Burn Eccl.  
L. 202. Roll.  
Abr. 907.

If the executor named in the will be unknown or concealed, administration may, after due process, be granted till he appear and claim the probate.

4 Burn Eccl.  
L. 209.

If the will be lost, two witnesses, superior to exception, who read the will, prove its existence after the testator's death, remember its contents and depose to its tenour, are sufficient to establish it.

Off. Ex.  
Suppl. 215.

So where the testator had delivered his will A. to keep for him, and four years afterwards died when the will was found gaawn to pieces by rats and in part illegible, on proof of the substance of the will by the joining of the pieces, and the memory of witnesses, the probate was granted.

If the testator resided in Scotland, and left effects there and in England, the will is proved in the first instance in the court of Great Sessions in Scotland, and a copy duly authenticated being transmitted hither, in is proved in the prerogative court and deposited as if it were an original will.

So in such case, if the testator resided in Ireland the will is proved in the spiritual court of the country; or if in the East or West Indies, in the probate court there, and a copy transmitted, proved, and deposited in the same manner.

When

## II. SPECIAL CIRCUMSTANCES.

47

Where the testator was resident in England, not merely as a visitor, and has left property in the plantations, the judge of probate in the plantations is bound by a grant of probate by the prerogative court here, and ought to make a similar grant to such grantee.

2 Amb. 415.

If a will be made in a foreign country, disposing of goods in England, it must be proved here. And if the effects were all abroad, and the will be proved according to the custom of the country where the testator died, it is sufficient. And the executor may plead such matter to a bill filed against him by the administrator, for an account of the deceased's personal estate.

2 Vin. Abr. 58.

2 Vin. Abr. 59. 69. 1 Vern. 397.

If a will be in a foreign language, the probate granted of a translation of the same by a notary public.

## S E C T. IX.

*Of caveats, revocation of probates, and appeals.*

WHEN the will is opposed, it is the practice to enter a caveat in the spiritual court to prevent the probate. And it is said, that by the rules of that court, the caveat shall stand in force for three months, and that while it is pending, probate cannot be granted; but whether the law recognizes a caveat,

caveat, and allows it so to operate, or whether does not regard it as a mere cautionary act by stranger, to prevent the ordinary from committing a wrong, is a point on which the judges of the temporal courts have differed<sup>a</sup>.

<sup>a</sup> 3 Bac. Abr.  
41. 1 Lev. 186.

Probate of a will is suspended by appeal, but cannot be stayed at the suit of a creditor, till commission of appraisement issued be returned for by the statute 21 H. 8. c. 5. the probate is to be granted with convenient speed, without a frustratory delay.

<sup>b</sup> 11 Vin. Abr.  
63. 4 Barn  
Ecc. L. 230.  
Stra. 857.

If a probate has been granted by the wrong jurisdiction, it is cause of reversal, or nullity, according to the distinction before stated<sup>c</sup>.

<sup>c</sup> Off. Ez. 48.  
Vid. supr. 30.

So also if the will be fraudulently proved, either in the common form, that is to say, by the oath of the executor, or more solemnly by the examination of witnesses, on such fraud being shewn the spiritual court will revoke the probate. So it may be vacated on proof of a revocation of the will on which it was granted, or of the making of one subsequent<sup>d</sup>.

<sup>d</sup> Off. Ez. 48.

<sup>e</sup> Com. Dig.  
Prerogative.

An appeal<sup>e</sup> in regard to probates, by statute 24 H. 8. c. 12. lies from the court of the archdeacon, or his official (if the matter be there commenced), to the bishop of the diocese; and by virtue of the same statute, from the bishop diocesan or his commissary, to the archbishop of the province.



nce, within fifteen days next after sentence. When the cause is commenced before the archdeacon of the archbishop, or his commissary, by the same statute there may be an appeal within the same period to the court of arches, or audience of the archbishop. And from the court of arches and audience, within fifteen days next after sentence given to the archbishop himself; and in case the king himself be a party in such suits, the appeal shall be within fifteen days next after sentence given, to all the bishops of the realm in the upper house of convocation assembled. By that statute, and also by statute 25 H. 8. c. 19. appeals to the pope are prohibited, and by the latter statute are taken from the archbishop's courts to the king in chancery, where a commission shall be awarded under the great seal, to certain persons to be named by the king for the determination of the appeals; and those commissioners are called delegates, inasmuch as they are delegated by the king's commission. And farther, although this last cited statute declare the sentence of the delegates definitive, the king, on complaint to him made, may grant a commission of review to revise the sentence of the delegates; because the pope, as supreme head by the canon law, used to grant such commission; and with such authority as the pope heretofore exercised, is now annexed to the crown by statute 26 H. 8. c. 1. and 1 Eliz. c. 1. But it is not matter of right, which the subject may demand *ex debito justitiæ*, but merely a matter of favour, which is never granted but under special circumstances<sup>1</sup>.

E

Before

h Off. Rz.  
Suppl. 127.  
129. 3 Bl. Com.  
64—67.

1 3 Bl. Com. 67.

k 2 Burn's Eccl.  
L. 193. 7 Mod.  
146.

Before revocation of a probate the court will not grant a new one<sup>k</sup>.

l 11 Vin. Abr.  
76. Com. Dig.  
Admor. B. 2.  
2 Roll. Abr.  
233.

Where probate granted by the spiritual court is affirmed on an appeal to the arches, or delegates the usage is to send the cause back. But when the first sentence is reversed, the court below shall be ousted of its jurisdiction, and the court which reverses it shall grant probate *de novo*<sup>l</sup>.

## S E C T. X.

*The effect of a probate.—Loss of the same.—What evidence of probate.—Effect of its revocation.*

THE probate thus passed, although it does not confer, yet authenticates the right of the executor and shall have relation to the time of the testator's death<sup>a</sup>.

a 11 Vin. Abr.  
205 Off. Ex.  
49 1 Term  
Rep. 480.  
4 Term Rep.  
260.

If the will be proved in common form, it may at any time within thirty years be disputed; if in the more formal mode, and all persons interested are made parties to the suit, and there be no proceedings within the time limited for appeals, it is liable to no future controversy<sup>b</sup>.

b 4 Burn Eccl.  
L. 207.  
Godolph. 62.

So long as the probate remains unrevoked, the seal of the ordinary cannot be contradicted, for the temporal

temporal court cannot pass judgment respecting will in opposition to that of the ecclesiastical court; and therefore if a probate under seal be shewn, evidence will not be admitted that the will was forged, or that the testator was *non compos mentis*, or that another person was executor; for these are points which are exclusively of spiritual cognizance: but it may be shewn that the seal was forged, or that there were *bona notabilia*, for such evidence is no contradiction to the seal, but admits and avoids it:

c. Stra. 671, 672.  
4 Burn Eccl.  
L. 196.

Such then being the nature of a probate, inasmuch as it is a judicial act of a court having competent authority; and is conclusive till it be reversed, and a court of common law cannot admit evidence to impeach it; it was determined in a recent case, in opposition to some old decisions, that payment of money to an executor, who had obtained probate of a forged will, was a discharge to the debtor of the intestate, although the probate were afterwards revoked, and administration granted to the next of kin:

d. 4 Roll. Abr.  
919 Com. Rep.  
152. Vid. 11  
Vin. Abr. 99.

4 Allen v.  
Dundas,  
3 Term Rep.  
125.

And on the same principle it is holden, that pending a suit in the spiritual court respecting the validity of a will, an indictment for forging it ought not to be tried; and it is the practice to postpone the trial, till that court has given sentence:

f. 3 Roll. Abr.  
24. 1. Stra. 481.  
703.



g 3 Term Rep.  
1301

But a payment of money under probate of a supposed will of a living person would be void because in such case the ecclesiastical court has no jurisdiction; and the probate can have no effect. The power of the ordinary extends only to the proving of wills of persons deceased <sup>g</sup>.

h Stra. 412.  
4 Burn Eccl.  
L. 219.

Where the probate is lost, the spiritual court never grants a second, but merely an exemplification of the probate from its own records, and such exemplification is evidence of the will's having been proved <sup>h</sup>.

i 2 Salk. 154.  
Ld Raym. 154.  
Law of Ni. Pri.  
245, 246.  
4 Burn Eccl.  
L. 219.  
4 Burn Eccl.  
L. 218. Ld.  
Raym. 731.

The copy of the probate of a will of personal property is evidence, inasmuch as the probate is an original taken by authority, and of a public nature <sup>i</sup>.

1 L. of Ni. Pri.  
246.

The register's book, or as it is sometimes styled the ledger-book, in the spiritual court, is evidence that there was such will, in case of its being lost.

A copy of the ledger-book seems also to be sufficient proof for the same purpose; since such book is a roll of the court, and, therefore, a copy of it is not a copy of a copy, as hath been erroneously supposed <sup>1</sup>.

m Off. Ex.  
Suppl. 9.  
9 Co. Rep. 31.

If issue be taken on a probate of a will, it shall be tried by a jury <sup>m</sup>.

The probate, or as it is sometimes called, the letters testamentary, may be revoked either on

it by citation, or on appeal to reverse a sentence which they are granted; and in case of revocation, all the intermediate acts of the executor shall be void.

But where a widow possessed herself of the personal estate as executrix under a revoked will, and paid debts and legacies without notice of the revocation, she was allowed those payments in equity; but leases which she had granted were ordered to be set aside<sup>a</sup>.

<sup>a</sup> 3 Bac. Abr.  
30. 1. Chan.  
Ca. 126.

### CHAP. III.

#### OF THE APPOINTMENT OF ADMINISTRATORS.

#### SECT. I.

*Of general administrations—origin thereof—when entitled.—Of consanguinity.*

**I**N case a party makes no testamentary disposition of his personal property, he is said to die intestate<sup>a</sup>, the consequences of which are now to be considered.

<sup>a</sup> 2 Bl. Com.  
494.

In ancient times the king was, on such event entitled to take possession, by his officers, of the effects, as the *parens patriæ*, and general trustee of the kingdom, in order that they might be applied in the burial of the deceased, in the payment of his debts, and in a provision for his wife and children, or if none, then for his next of kin<sup>b</sup>. This prerogative was most probably exercised in the county court; it was also delegated as a franchise to many lords of manors, and others, who have, to this day, a prescriptive right to grant administration to their intestate tenants, and suitors, in their own courts baron, and other courts, or, as we have seen<sup>c</sup>, to grant probate of their wills, in case they have made any disposition<sup>d</sup>.

<sup>b</sup> 2 Bl. Com.  
494. 9 Co. 38.  
b.

<sup>c</sup> Vid. *supr.* 27.  
<sup>d</sup> 2 Bl. Com.  
494. 9 Co. 37.  
b.

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This power was afterwards vested by the crown in the prelates, who, on account of their superior sanctity, were, by the superstition of the times, conceived capable of disposing of the property most to the benefit of the deceased's soul<sup>a</sup>. The effects were, therefore, committed to the ordinary, and he might seize and keep them without wasting, and also give, alien, or sell them, at his pleasure, and dispose of the money in pious uses. If he did otherwise, he violated the trust reposed in him as the king's almoner, within his diocese<sup>b</sup>. The jurisdiction of proving wills of course fell into the same channel, since it was thought reasonable that they should be proved to the satisfaction of him, whose right of distribution they effectually superseded<sup>c</sup>.

<sup>a</sup> Perkins, sect. 486.

<sup>b</sup> Plowd. 277.

<sup>c</sup> 2 Bl. Com. 494.

Whether the ordinary's power of disposition extended to the whole of the personal estate, or only to one third, after the *partes rationabiles*, or two thirds belonging to the wife and children, were deducted, is a point on which there is a difference of opinion<sup>d</sup>; but this is clear, the trust, whether more or less extensive, he did not very faithfully execute. He converted to his own use, under the name of church and poor, the whole of such property, without even paying the deceased's debts. To redress such palpable injustice the stat. of *Westminster* 2. or the 13 *E. 1. c. 19.* was passed; by which it is enacted, that the ordinary is bound to pay the debts of the intestate, so far as his goods will extend, in the same manner as executors are bound,

<sup>d</sup> 2 Bl. Com. 491—495. 2  
Inst. 33.

i 2 Bl. Com.  
495.

bound, in case the deceased has left a will; a will as Mr. Justice *Blackstone* styles it, more truly pious than any requiem, or mass for his soul<sup>1</sup>.

Although the ordinary were now become liable to the intestate's creditors, yet the residue, after payment of debts, continued in his hands, to be applied to whatever purposes his conscience might approve. But as it was not sufficiently scrupulous to prevent the perpetual misapplication of the fund, the legislature again interposed, in order to direct him, and his dependants, of the administration. The stat. 31 E. 3. c. 11. therefore, provides, that in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods, and they are thereby put on the same footing in regard to suits, and to accounting as executors appointed by will<sup>2</sup>.

k 2 Bl. Com.  
495. 496.  
3 Bac. Abr. 54.  
Raym. 498.

Such is the origin of administrators: They are the officers of the ordinary, appointed by him in pursuance of the statute, which selects the next and most lawful friends of the intestate. But the stat. 21 H. 8. c. 5. allows the ecclesiastical judge a little more latitude, and empowers him to grant administration, either to the widow, or next of kin, or to both of them, at his own discretion. And where two or more persons are in the same degree of kindred, in case they apply, gives him his election to accept which ever he pleases.

Letter

Letters of administration, then, must be granted by the ordinary to such persons, as the statutes 1 E. 3. & 21 H. 8. point out<sup>1</sup>, that is, according to the former statute, to the next and most lawful friends of the intestate; according to the latter, to the widow, and next of kin, or both, or either of them.

What parties fall within the first description, it was the province of the courts of common law to determine<sup>2</sup>, and they have interpreted such friends to mean in the first place the husband, if he were not entitled at common law, and, secondly, the next of blood, under no legal disabilities<sup>3</sup>.

m 3 Bac. Abr.  
34. 11 Vin.  
Abr. 93. 1.  
Ventr. 218.  
n 3 Bl. Com.  
496. 9 Co.  
39. b.

First, the ordinary is bound to grant administration of the effects of the wife to the husband<sup>4</sup>.

o 11 Vin. Abr.  
86.

Various opinions indeed have been held with regard to the husband's title to administer. Some have maintained that he has no such exclusive right, either at common law, or by virtue of the statutes; but that the ordinary may refuse the administration to him, and may elect to grant it to the next of kin of the wife<sup>5</sup>. By others, it has been asserted, that he is entitled under the equity

p Cro. Car:  
106.

of the stat. of the 21 H. 8. whereby the ordinary is directed to grant administration of the husband's effects to the wife, or next of kin, or to either<sup>6</sup>. By a third class, it has been insisted, that although the husband is not expressly named in the stat. 1 E. 3. nor does he answer the description of next

q 11 Vin. Abr.  
84. in not.



next of kin of the wife, yet he is included under the denomination of the next and most lawful friend of the intestate; and that thus he supports his claim, not on the common law, nor, as described *eo nomine*, by 'the statute, but as comprehended within its general provision'. By a fourth, it is alledged, and the doctrine is recognized, in a recent case, by very high authority', that he is entitled at common law, *jure mariti*, and that his right is not derived from any of the statutes, but, on the contrary, is supposed by them, and exists independently of them all. However, to speculate on these points is useless to the present purpose, since the husband's right to administer, on whatever foundation, is now beyond all question established.

1 Salk 36.  
11 Vin Abr.  
73. 84. in not.  
116. 1 Show  
327. 1 P Wms.  
44. 4 Burn  
Eccl. L. 235.  
1 Watt v. Watt.  
3 Ves. jun. 246.  
247. Vjd. also  
Cont. Dig.  
Admor. B. 6.  
282. 2 Bl. Com.  
515. 4 Co. 51.  
b. Roll. Abr.  
910. 4 Burn  
Eccl. L. 264.

The stat. 29 Car. 2. c. 3. contains a clause, that the statute of distributions, the 22 & 23 Car. 2. c. 10. hereafter to be discussed, shall not prejudice such title of the husband, under an apprehension that it might be considered to be thereby affected.

Such is the general right of the husband to the administration of the wife's effects; but this right may, in certain cases, be controlled or varied. If the husband parts with all his interest in his wife's fortune, he shall not be entitled to the administration; as, where a wife had a power to make a will and dispose of her whole estate, and, though,

u 3 Esc. Abr.  
55. in not.  
Com. Dig.  
Admor. B. 6.

though, strictly speaking, she made no will, but whether an appointment capable of operating only in equity, the court held that it was for the spiritual jurisdiction to determine to whom to grant administration, and refused to interpose in favour of the husband.

4 Burn Eccl.  
L. 431. Stra.  
1111.

So where a feme covert, by virtue of her power to dispose of her estate, devised a term for years to S. administration was granted to the devisee.

11 Vin. Abr.  
87. Prac.  
Chan. 480.  
Gibb. Eq. Rep.  
143.

On the other hand, where the return to a *manumus* to grant administration to a husband stated, that, by articles before marriage, it was agreed that the wife should have power to make a will, and dispose of a leasehold estate, and pursuant to this power, she had made a will, and appointed her mother executrix, who had duly proved the same, it was objected that she might have things in action not covered by the deed, and that the husband was, at all events, entitled to an administration in respect to them, though equity would controul it in respect to the lease; the court allowed the objection, and granted a peremptory *mandamus*.

4 Burn Eccl.  
L. 332. Stra.  
891.

In case of a limited probate, granted to the executor of a married woman, as above mentioned, the husband is entitled to administration of the other part of her property, which is called an *administration caterorum*.

Secondly,

Secondly, the ordinary is to grant administration of the effects of the husband to the widow, or next of kin; but he may grant it to either, or both, at his discretion<sup>a</sup>. If the widow renounce administration, it shall be granted to the children, or other next of kin of the intestate, in preference to creditors.

<sup>a</sup> Vid. 11 Vin. Abr. 92.

The ordinary may grant administration *quoad* part to the wife, and as to the other part, to the next of kin; for in such case there can be no ground to complain, as the ordinary was not bound to grant it exclusively to either<sup>a</sup>.

<sup>a</sup> 11 Vin. Abr. 71. 3 Bac. Abr. 55. Com. Dig. Admor. B. 6. 1 Salk. 36.

It now becomes necessary to inquire, who are such next of kin as shall be thus entitled.

Consanguinity or kindred is defined to be *vinculum personarum ab eodem stipite descendendum*, the connection or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal, or collateral<sup>b</sup>.

<sup>b</sup> 2 Bl. Com. 202.

Lineal consanguinity is that which subsists between persons of whom one is descended in a direct line from the other, as between J. S. the *propositus* in the table of consanguinity, and his father, grand-father, great-grand-father, and so upwards in the ascending line, or between J. S. and his son, grandson, and great-grandson, and so downwards, in the direct descending line. Every generation in this lineal direct consanguinity constitutes a different



different degree, reckoning either upwards, or downwards. The father of J. S. is related to him in the first degree, and so likewise is his son; his grandfire and grandson, in the second; his great-grandfire and great-grand son, in the third. This is the only natural way of reckoning the degrees in the direct line, and, therefore, universally obtains, as well in the civil, and canon, as in the common law.

Thus this lineal consanguinity falls strictly within the definition of *vinculum personarum ab eodem capite descendit*, since lineal relations are such as descend one from the other, and both of course from the same common ancestor.

c 2 Bl. Com.  
203, 204.

Collateral kindred answers to the same description. Collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor, but, differing in this, that they do not descend the one from the other.

Collateral kinsmen are then such as lineally spring from one and the same ancestor, who is the *stirps* or root, *stipes* or common stock from which these relations are branched out. As if J. S. have two sons, who have each issue; both of these issues are lineally descended from J. S. as their common ancestor, and they are collateral kinsmen to each other, because they are all descended from the same common ancestor, and all have a portion of his

his blood in their veins, which denominates them *consanguineos*.

Thus the very being of collateral consanguinity consists in this descent from one and the same common ancestor. A. and his brother are related, because both are derived from one father. A. and his first-cousin are related, because both are descended from the same grandfather; and his second-cousin's claim to consanguinity is this, that they are both derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen are derived. And, as from one couple of ancestors the whole race of mankind is descended, it necessarily follows, that all men are in some degree related to each other<sup>d</sup>.

<sup>d</sup> 2 Bl. Com.  
204, 205.

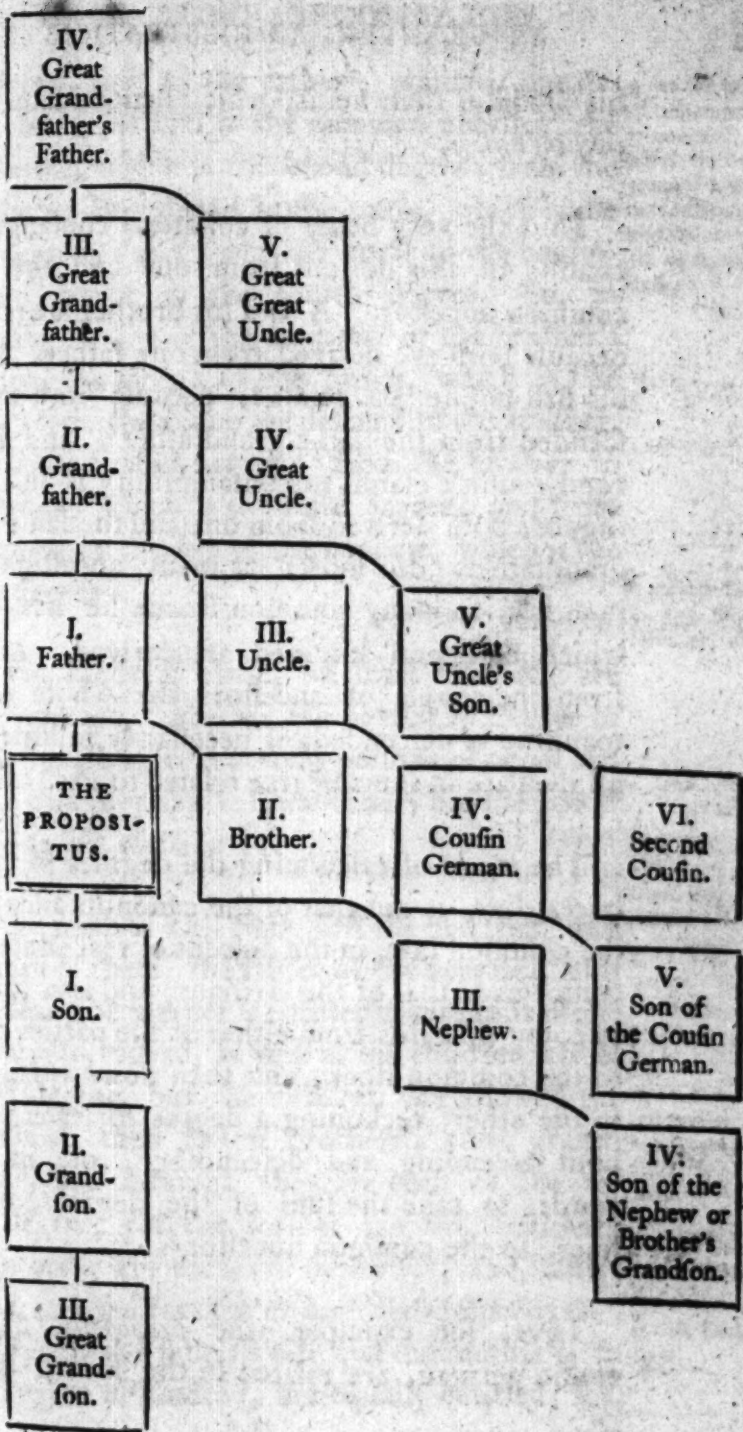
The mode of calculating the degrees in the collateral line, is not that of the canonists adopted by the common law, in the descent of real estates, but conforms to that of the civilians, and is as follows: to count upwards from either of the parties related to the common stock, and then downwards again to the other, reckoning a degree for each person, both ascending and descending<sup>e</sup>; or, in other words, to take the sum of the degrees, in both lines, to the common ancestor<sup>f</sup>.

<sup>e</sup> 2 Bl. Com.  
207.

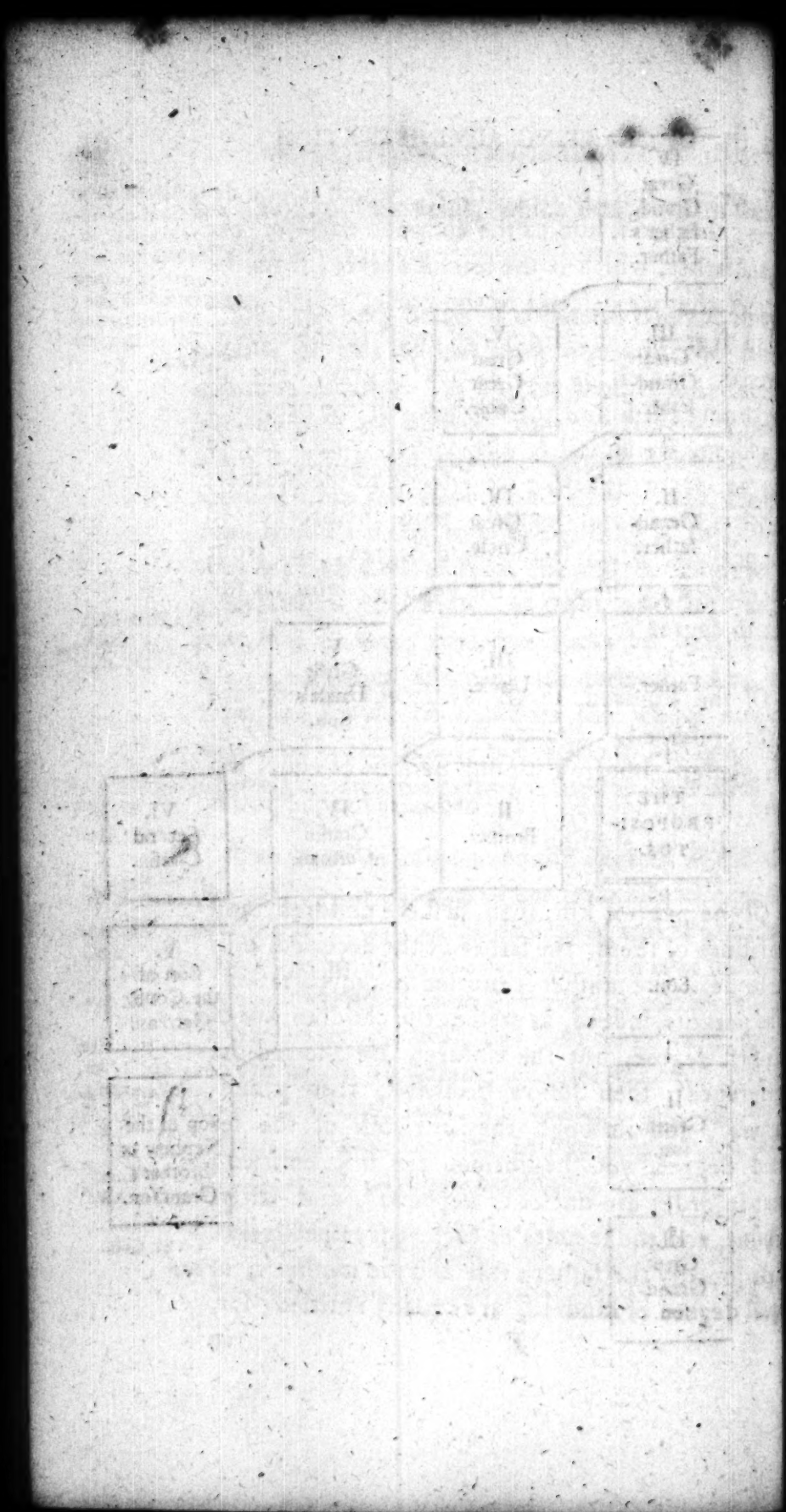
<sup>f</sup> *Ibid.* 12.  
Edit. not. (4).

Thus, for example, the *propositus*, and his cousin-german, are related in the fourth degree.

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We ascend, first, to the father<sup>s</sup>; which is one degree; and from him to the common ancestor, the grandfather, which is the second degree; from the grandfather we descend to the uncle, which is the third degree; and from the uncle to the cousin-german, which is the fourth degree. So, in reckoning the son of the nephew, or the brother's grandson, we ascend to the father, which is one degree; from the father we descend to the brother, which is the second degree; from the brother to the nephew, which is the third degree; and from the nephew to the son of the nephew, which is the fourth degree<sup>a</sup>.

g See the table of consanguinity annexed, in which the degrees of collateral consanguinity are computed, as far as this sixth.

h 4 Burn Eccl. L. 355. Black. Detc. 41; 42.

Of the kindred, those, we must recollect, are to be preferred, who are the nearest in degree to the intestate, but from among persons of equal degree, in case they apply, the ordinary has the power of making his election<sup>1</sup>.

l 11 Vin. Abr. 114, 115. Com. Dig. Admor. B. 6.

Of the next of kin, then, first the children, and in failure of them, the father of the deceased, or if he be dead, the mother is entitled to administration: The parents, indeed, as well as the children, are of the first degree, but the children are allowed the preference<sup>2</sup>, then follow brothers<sup>3</sup>, then grandfathers<sup>4</sup>, and although they are both of the second degree, yet the former are first entitled; next in order are uncles or nephews<sup>5</sup>, and, lastly, cousins, and the females of each class respectively<sup>6</sup>. Relations by the father's side and the mother's, in equal degree of kindred, are equally entitled; for,

k 11 Vin. Abr. 91, 92. 1 Bl. Com. 504.  
l 11 Vin. Abr. 93.  
m 11 Vin. Abr. 93. and in not. Ld. Raym 624. Com. Dig. Admor. B. 6. 1 Salk. 38. n 2 Bl. Com. 505. 1 Ash. 455. o 2 Bl. Com. 505.

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in

in this respect, dignity of blood gives no preference<sup>p</sup>. So, the half blood is admitted to the administration as well as the whole<sup>q</sup>, for they are the kindred of the intestate, and excluded from inheritances of land only on feudal reasons<sup>r</sup>; therefore, the brother of the half blood shall exclude the uncle of the whole blood<sup>s</sup>; and the ordinary may grant administration to the sister of the half, or the brother of the whole, blood, at his discretion<sup>t</sup>.

p 1 P. Wms. 53.

q 11 Vin. Abr. 91. 1 Vent. 323, 424.

r 2 Bl. Com. 505.

s 11 Vin. Abr. 35.

t 2 Bl. Com. 505.

If a feme covert be entitled, she cannot administer unless with the husband's permission<sup>u</sup>, inasmuch as he is required to enter into the administration bond, which she is incapable of doing. But, if it can be shewn by affidavit, that the husband is abroad, or otherwise incompetent, a stranger may join in such security in his stead. In either case the administration is committed to her alone, and not to her jointly with her husband<sup>v</sup>, otherwise, if he should survive her, he would be administrator, contrary to the meaning of the act.

u 12 Vin. Abr. 85. 4 Burn Eccl. L. 241. Com. Dig. Admin. D. 85. 75.

v 11 Vin. Abr. 85. 4 Burn Eccl. L. 241. Com. Dig. Admin. D. 1 Salk. 306. Vid. Bl. Rep. 301.

If it were committed to them jointly, during coverture only, it might, perhaps, be good, because, if committed to the wife alone, the husband, for such period, may act in the administration with or without her assent, and, therefore, the effect of the grant seems in either case the same<sup>w</sup>.



If the wife be the only next of kin, and a minor, she may elect her husband her guardian, to take the administration for her use and benefit during her minority; but the grant ceases on her coming of age, when a new administration may be committed to her.

The stat. 21 H. 8. has also expressly provided for another case than that of actual intestacy; namely, where the deceased has made a will, and appointed an executor, and such executor refuses to take out probate<sup>2</sup>, in such an event the ordinary must grant administration *cum testamento annexo*, with the will annexed, and the duty of such grantee differs but little from that of an executor<sup>3</sup>. He is equally bound to act according to the tenour of the will.

Y 4 Burn Eccl.  
L. 228. 12 Vin.  
Abr. 78. 2 inst.  
397.

2 2 Bl. Com.  
504.

Vid. supr. 44.

So, if one of two executors proves the will and dies, and then the other refuses, such administration shall be granted.

The ordinary cannot grant administration with the will annexed in which an executor is named, until he has either formally renounced his right to the probate, or neglected to appear, on being duly cited to accept, or refuse the same. So, if several executors are named in the will, they must all refuse or fail to appear, on citation, previous to the grant. After such administration the executor cannot retract his refusal during the life-

time of the administrator, but he may do so after the grant has ceased by the administrator's death.

A party, although otherwise entitled, may be incapable of the office of administrator, on account of some disqualification in point of law. The incapacities of an administrator are not confined to such as have been enumerated in respect of executors, but comprise attainder of treason or felony, outlawry, imprisonment, absence beyond sea, bankruptcy<sup>a</sup>, and, in short, almost every species of legal disability, for, by the express requisition of the statute, the ordinary is bound to grant administration to the next and most lawful friends of the intestate<sup>b</sup>.

<sup>a</sup> 9 Co. 39. b.  
Com. Dig.  
Admor. (B. 6.)  
<sup>c</sup> Burn Eccl.  
233. 3 Bac.  
Abr. 56. in  
not.

<sup>b</sup> Com. Dig.  
Admor. (B. 6.)  
1 Salk: 36.

<sup>c</sup> Com. Dig.  
Admor. (B. 6.)  
Cret. Car. 9.  
1 Brownl. 31.  
d. 11 Vin. Abr.  
94. 2 Vern.  
126.

But coverture is no incapacity, nor is alienage, if qualified, as in the case of executors<sup>c</sup>. Even an alien of the half blood may be appointed an administrator<sup>d</sup>.

## S E C T. II.

*Of the analogy of administrations to probates.*

WHAT has been stated respecting the different jurisdictions relative to probates, of issuing a commission or requisition in case the party be in an ill state of health, or reside at a distance; of *bona vacantia*

*tabilia*; of the ecclesiastical privilege of granting probate, being personal and not local<sup>a</sup>; of its devolving on the archbishop where the party deceased was a bishop, and on the dean and chapter in case of the death or suspension of the metropolitan or ordinary; of his being compellable by *mandamus* to grant probate, unless he return a *lis pendens*<sup>b</sup>; of caveats and appeals; of the power of the court of appeal to grant probate where the sentence is reversed<sup>c</sup>; of probates being of unquestionable validity in courts of common law; of the register's book in the spiritual court being evidence where the probate is lost<sup>d</sup>; and, if issue be taken thereon, of its being triable by a jury, applies equally to letters of administration.

<sup>a</sup> 4 Burn Eccl. 247.

<sup>b</sup> 4 Burn Eccl. L. 230. Com. Dig. Admor. (B. 7.) 11 Vin. Abr. 74. 202. 4 Inst. 335.

<sup>c</sup> 11 Vin. Abr. 76. Com. Dig. Admor. (B. 2.) 2 Roll. Abr. 233.

<sup>d</sup> 4 Burn Eccl. L. 248. 1 Lev. 101.

### SECT III.

*In regard to the acts of a party entitled, previous to the grant.*

ALTHOUGH an executor may perform many acts before he proves, yet a party can do nothing as administrator, till letters of administration are issued, because the former derives his authority from the will, and not from the probate; the latter owes his entirely to the appointment of the ordinary<sup>a</sup>.

<sup>a</sup> 11 Vin. Abr. 202. 4 Burn Eccl. L. 241. Salk. 301.

It



b 4 Burn Eccl.  
L. 242. Bar-  
nadist. 330.

It has, indeed, been held, that a party before administration may file a bill in chancery, although he cannot commence an action at law.<sup>b</sup>

e Vid. supr.  
22. 41.

But by stat. 37 Geo. 3. c. 90. s. 10. if a party administer, and omit to take out letters of administration within six months after the intestate's death, he incurs the penalty of fifty pounds<sup>c</sup>.

#### S E C T. IV.

##### *Practice in regard to administrations.*

a 4 Burn Eccl.  
L. 242.

LETTERS of administration do not issue till after the expiration of fourteen days from the death of the intestate, unless for special cause, as that the goods would otherwise perish, the judge shall think fit to decree them sooner<sup>a</sup>.

On taking out letters of administration the party swears that the deceased made no will, as far as the deponent knows or believes, and that he will truly administer the goods, chattels, and credits, by paying the deceased's debts, as far as the same will extend, and the law charge him; and that he will make a true and perfect inventory of all the goods, chattels, and credits, and exhibit the same into the registry of the spiritual court, at the time assigned him by the court, and to render a

just

just account of his administration, when lawfully required.

And, pursuant to the stat. 21 *H. 8. c. 5.* and the 22 & 23 *Car. 2. c. 10.* he enters into a bond with two or more sureties conditioned for the making, or causing to be made, a true and perfect inventory of all and singular the goods, chattels, and credits of the deceased, which have or shall come to the hands, possession, or knowledge, of the administrator, or into the hands or possession of any other person or persons for him; and for exhibiting the same into the registry of the spiritual court, at or before the end of six months; and for well and truly administering, according to law, such goods and chattels; and farther, for the making a true and just account of his administration, at or before the end of twelve months; and for delivering and paying all the rest and residue of the goods, chattels, and credits, which shall be found remaining on his accounts, (the same being first examined and allowed of by the judge of the court), unto such person or persons respectively, as the judge by his decree or sentence, pursuant to the statute of distribution, shall limit and appoint; and, if it shall thereafter appear, that any will was made by the deceased, and the executor therein named exhibit the same into the court, making request to have it allowed and approved accordingly, for the administrators rendering and delivering, on being thereunto required, (approbation of such testament being

being first had, and made), the letters of administration in the court.

When administration has been once committed to any of the next of kin, others, even in the same degree of kindred, have, during the life of the administrator, no title to a similar grant; so different is this case from that of an executor, who has a right to probate, though it has been already taken out by his co-executor. The maxim, "*quis prior est tempore, potior est jure*," applies in the former, but not in the latter, instance.

a 11 Vin. Abr.  
116. 1 Vent.  
218.

## S E C T. V.

### *Of special and limited administrations.*

THERE are also various classes of administrations, which, although not founded on the letter of any of the abovementioned statutes, fall within their spirit, and intendment. As, if no executor be named in the will, the clause for such appointment being wholly omitted, or where a blank is left for his name, administration with the will annexed shall be granted.

a 4 Burn Eccl.  
L. 237. 11 Vin.  
Abr. 94.  
Plowd. 279.  
a P. Wms. 582.  
589, 520.  
b 11 Vin. Abr.  
69. Com. Dig.  
Admor. (B. 1.)

b 11 Vin. Abr.  
85. Sty. 147.

Or, if the executor die in the life-time of the testator; or if the testator name the executor of B.



### III. LIMITED ADMINISTRATION.

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be his executor, and die in the life-time of B.  
till B.'s death he is in effect intestate<sup>d</sup>.

<sup>d</sup> Com. Dig.  
Admor. (B. 1.)

Or, if he name an executor to have authority  
ter a year from his death, for during the year  
ere is no executor<sup>e</sup>, and in such cases admini-  
ration shall be granted in the interval.

<sup>e</sup> Plowd. 279.  
281. b.

So, if the executor be incapable of the office,  
e party is said to die *quasi intestatus*, and the or-  
nary must grant administration.

So, in all the above-mentioned instances, if there  
a residuary legatee, administration is, in general  
anted to him in exclusion of the next of kin,  
cause in that case the next of kin hath no inter-  
in the property, and the presumption of the  
tute, that the testator would have given it to him  
annot exist, where such a legatee is appointed<sup>f</sup>.

<sup>f</sup> 11 Vin. Abr.  
90. 94.

If several persons are entitled to the residue, it  
ay be granted to any of them<sup>g</sup>; and if it be  
us granted, the other residuary legatees have no  
him to a subsequent grant in the life-time of the  
antee.

<sup>g</sup> Com. Dig.  
Admor. (B. 6.)  
<sup>h</sup> Jon. 162.  
<sup>i</sup> 11 Vin. Abr. 94.

Such administration may be also granted, al-  
ough it be uncertain whether there will eventu-  
y be a residue, or not<sup>h</sup>.

<sup>h</sup> Com. Dig.  
Admor. (B. 6.)  
<sup>i</sup> Lev. 50.  
<sup>j</sup> Vent. 279.

Of this species also is an administration *durante*  
*minoritate*, or during the infancy or minority of

an

an executor, or a party entitled to administration.

i Com. Dig.  
Admon. (F.)  
21 Vin. Abr.  
105.

A distinction exists in the spiritual court between an infant and a minor. The former is so denominated if under seven years of age; the latter from seven to twenty-one. The ordinary *ex officio* appoints a guardian to an infant. The minor himself appoints his guardian, who then is admitted in that character by the judge. According to the practice of the court, the guardianship in either case is granted to the next of kin of the child, unless sufficient objection to him be shewn, and administration is committed to such appointee for the use and benefit of the infant or minor.

Although, as we have seen, an administrator during the minority of an infant executor was, antecedently to the stat. 38 Geo. 3. c. 87. determined on his attaining the age of seventeen, administration during the minority of an infant next of kin was always of force until his age twenty-one; on the principle, that the authority of an administrator is derived from the stat. of Ed. 3. c. 11. which admits only of a legal construction, and therefore it was held he must be of the legal age of twenty-one, before he is competent; but the executor comes in by the act of the party, and that he should be capable of the executorship at the age of seventeen, was in conformity

4 Burn Eccl.  
L. 238, 239.  
Ld Raym. 667.  
Com. Dig.  
Admon. (F.)

to other provisions of the spiritual law<sup>t</sup>. And which was the more forcible reason, because

stat

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ute of distributions requires administrators to  
e a bond, which an infant is incapable of do-

k 11 Vin. Abr.  
100, 101.  
3 Bac. Abr. 13:  
Harg. Co. Litt.  
89. b. Note 6.

But now by the above-mentioned stat. 38.

3. c. 87. reciting, that inconveniencies arose  
in granting probate to infants under the age of  
twenty-one, it is enacted, that where an infant is  
executor, administration with the will annex-  
shall be granted to the guardian of such infant,  
or such other person as the spiritual court shall  
think fit, until such infant shall have attained the  
age of twenty-one years, at which period, and  
before, probate of the will shall be granted to

administration be granted to such guardian  
for the use and benefit of several infants, it ceases  
when the eldest attaining twenty one.

if there be several infant executors, he who first  
attains the age of twenty-one years shall prove the  
will, and the administration shall cease: but ad-  
ministration granted during the minority of several  
children will not expire on the marriage of one of  
them to a husband of full age. Nor, if an infant  
executrix, shall it be determined by her taking  
a husband who is of age. Nor, if there be several  
infants, by the death of one of them.

14 Burn Eccl.  
1. 240.

m Sed vid.  
Cora. Dig.  
Admon. (F.)  
and 5 Co. 29. b.

if there be two executors, one of whom has at-  
tained the age of twenty-one years, and the other  
not,



not, administration shall not be granted during minority of him that is underage, because the executor may execute the will<sup>a</sup>.

<sup>a</sup> 4 Burn Eccl.

L. 240. 1

Brownl. 46.

11 Vin Abr.

99. 1 Mod. 47.

<sup>c</sup> 11 Vin. Abr.

97, 98, 99.

3 Bac. Abr. 13.

3 Lev. 239, 240.

2 Jo. 119.

Velv. 130.

According to other authorities<sup>b</sup>, administration shall in such case be granted to the one executor during the minority of the other; but they are not warranted by modern practice.

This administration ought not to be committed to a party who is very poor, or in distressed circumstances, though the guardian or next of kin to the infant. When the court of Chancery sees reason to think that such administrator will waste, or misapply the effects of the intestate to the prejudice of the infant, for whom he is merely a trustee, the court will appoint a receiver of the personal estate notwithstanding the grant of administration<sup>c</sup>.

<sup>b</sup> 11 Vin. Abr.

100 Barnard.

23, 24.

It has been held by some, that if such administrator continues the possession of the goods at the full age of the executor, he becomes an executor *de son tort*; but this is denied by others, and their opinion seems to be the more correct, because he came to the possession of the goods lawfully<sup>d</sup>.

<sup>c</sup> 11 Vin. Abr.

98. 1 Sid. 57.

In this class is also to be ranked administration *pendente lite*, while the suit is pending<sup>e</sup>; and may be granted, whether the suit respects the will or the right of administration<sup>f</sup>. But it is not granted till a plea in the cause has been given and admitted.

<sup>d</sup> 4 Burn Eccl.

L. 237.

<sup>e</sup> 3 Bac. Abr.

46. 2 P. Wms.

576. 11 Vin.

Abr. 105.

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For will the court of Chancery, generally speaking, in such case interfere, and appoint a receiver during the litigation?

14 Burn. Eccl.  
L. 238. 1 Vol.  
325.

Of the same species also is administration grounded on the incapacity of the next of kin at the time of the intestate's death, arising, for instance, from idioty, or excommunication, madness, or bankruptcy. If such incapacity be afterwards removed, the administration may be avoided.

1 Com. Dig.  
Admor (B. 1.)  
Salk. 36.

To this description also must be referred administration granted at common law, *durante absentia*, during the absence of the executor, or next of kin, from the kingdom; and it of course ceases on the appearance of the executor, or next of kin, and his taking out probate, or administration.

Under this head also is comprised administration granted to a creditor; such administration in general is warranted only by custom, and not by any express law, and may be granted where it is visible that the next of kin cannot derive any benefit from the estate; but that is to be understood only where they refuse the grant, and the course is for the ordinary to issue a citation for the next of kin in special, and all others in general, to accept or refuse the grant of administration, or shew cause why the same should not be granted to a creditor.

14 Burn Eccl.  
L. 230. 1 Bl.  
Com. 505.  
Salk. 38.  
Com. Dig.  
Admor. (B. 4.)

And by the aforesaid stat. 38 Geo. 3. c. 87. if after the expiration of twelve calendar months from

from the testator's death, the executor to whom probate hath been granted shall be residing out of the jurisdiction of his majesty's courts, on application of any creditor, next of kin, or legatee grounded on an affidavit, in the form therein specified, stating the nature of his demand, and absence of the executor, such administration shall be granted.

Of the same nature is administration committed by the ordinary in default of all the above mentioned parties, to such discreet person as shall approve<sup>s</sup>.

\* 3 Bl. Com.  
505.

The jurisdiction of granting these administrations results from the ordinary's original power at common law, by which he may make the grant to whom he pleases, and, therefore, it is held that he may in these cases, as not having been expressly provided for, impose on the grantee such terms as he may think reasonable<sup>s</sup>.

† 4 Burn Eccl.  
L. 237. 2 P.  
Wms. 582.  
589. 590. Hob.  
250. 1 Vent.  
219.

Hence, where the executors renounced, and a residuary legatee moved for a *mandamus* to the ecclesiastical judge to be admitted to prove the will and have administration with the will annexed, shewing cause the court held, that the matter was left to the election of the ordinary, and discharged the rule<sup>s</sup>.

\* 4 Burn Eccl.  
L. 237. Stra.  
956. Com. Dig.  
Admor. (B. 6.)

So, where a grandfather moved for a *mandamus* to such judge to grant him administration of the effects



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of his deceased son during the minority of  
grandson, the court refused the application<sup>b</sup>.

b 4 Burn Eccl.  
L. 231. Sum.  
89a

On the same principle, where, on the renun-  
tion of the next of kin, several creditors apply  
administration, though the court may prefer  
one of them, yet on the petition of the others,  
will compel him to enter into articles, to pay  
of equal degree in equal proportions, with-  
any preference of his own.

There may be also a limited or special admini-  
stration committed to the party's care, namely, of  
certain specific effects, as of a term for years, and  
like, and the rest may be committed to others,  
for effects of the intestate in this county, or  
else, to one, and for effects in that county, or  
else, to another; and as well in general cases,  
as in the case above stated, of the wife and next of

But several administrations cannot be grant-  
ed in respect of one and the same thing; as a  
debt, or a bond, or any other debt. For it would  
be absurd, that two persons should have a distinct  
administration of an individual chattel, or *chose in action*<sup>d</sup>.  
In respect however to creditors, such several ad-  
ministrations are all considered as one person, and  
may be sued accordingly<sup>e</sup>.

c Com. Dig.  
Admor. (B. 7.)  
Roll Abr. 908.  
Vid. sup. 60.

d 3 Bac. Abr.  
57. Roll Abr.  
908. Salk. 36.

e 11 Vin. Abr.  
139. Cro. Car.  
293.

Administration also may be granted on condi-  
tion, as where a former grantee is outlawed, and in  
exile beyond sea, it may be committed to another,  
but

but so as if the first grantee shall return he shall be entitled to administer<sup>f</sup>.

f Com. Dig.  
Admor. (B. 7.)  
Roll. Abr.  
908. 11 Vin.  
Abr. 70.

The ordinary also, in default of persons entitled to the administration, may grant letters *colligendum bona defuncti*, and thereby take the goods of the deceased into his own hands, and thus assume the office of an executor, or administrator in respect to the collecting of them; but the grantee of such letters cannot sell the effects without making himself an executor *de son tort*. The ordinary has no such authority, and therefore cannot confer it on another.<sup>g</sup>

g 4 Burn Eccl.  
L. 241. 11 Vin.  
Abr. 87. 2 Bl.  
Com 505.

If a bastard, who, as *nullius filius*, hath no kindred, or any other person having no kindred, intestate, and without wife or child, it hath formerly been holden, that the ordinary could sell his goods, and dispose of them to pious uses; but now it seems settled, that the king is entitled to them as *ultimus haeres*; yet in such case it is a practice to transfer the royal claim by letters patent, or other authority, from the crown, with reservation, as it is said, of a tenth or other small proportion of the property, and then the ordinary of course grants to such appointee the administration<sup>h</sup>.

h Com. Dig.  
Admor. (A.)  
11 Vin. Abr. 88.  
3 P. Wms. 33.  
1 Wooddes 398.

It has, indeed, been asserted, that such letters patent are merely in the nature of a recommendation; and that though it be usual for the ordinary

to admit such patentee, yet it is rather out of respect to the king, than strictly of right.

11 Vin. Abr. 86. 1 Salk. 37.

Administration may also be granted to the attorney of all executors, or of all the next of kin, provided they reside out of the province; but if the effects are under twenty pounds, such administration may be granted, whether they are so resident, or not.

## SECT. VI.

*Of administrations to intestate seamen, and marines.*

WITH regard to the administration of the wages, pay, prize-money, or allowance of money, of such petty officers, and seamen, non-commissioned officers of marines, and marines, as are above-mentioned, in respect of services in his Majesty's navy by the before cited stat. 32 Geo. 3. c. 34. it is enacted, that the party claiming such administration shall send a note to the inspector of seamen's wills, stating the name of the deceased, the name of the ship or ships to which he belonged, and that the party has been informed of his death, and requesting the inspector to give such directions as may enable him to procure letters of administration to the deceased; on receipt of which, the inspector shall transmit the form of a letter, containing a list of

G

the



the degrees of kindred to the tenth degree inclusive, with blanks for the time and place of the intestate's birth, and the ship he belonged to, and that the party had obtained information of his death, with blanks for the place where, and the time when it happened, without leaving a will, to the best of the party's knowledge and belief; and applying to the inspector for a certificate, to enable such party to obtain letters of administration to the deceased's effects, with also a blank for his degree of kindred; and stating, that no one, to the best of his knowledge and belief, was of a nearer degree at the time of the intestate's death, who died (with a blank, in which to insert whether) bachelor or widower; to which form shall be subjoined a blank certificate, to be signed by two reputable housekeepers of the parish where the party applying is resident, of their knowledge of him, and of their belief, that what he states is true; and also another certificate, to be signed by the minister of the parish, and two of the churchwardens, or two elders of the same, as the case may be, certifying that such two housekeepers are resident in the parish, and of good repute; and also stating, that if the party applying is the widow of the deceased, she must forward with such certificate an extract from the parish register, or some other authentic proof of her marriage, and containing also the same directions as annexed to the second certificate subjoined to the abovementioned check\*, in regard to proof of the deceased's death, if he died after he had left the naval service, in regard to mentioning the name of a proctor to

\* *Supra* 33.

be employed in obtaining the administration: and that the application, when filled up and attested, shall be sent by the general post under cover, directed to the treasurer or paymaster of his majesty's navy, London. And on the receipt of such paper, the party claiming the administration shall fill up the blanks in the first part of the paper, and shall subscribe the same, and two inhabitants of the parish within which the party shall reside, shall sign the first certificate on the paper, having previously filled up the blanks therein, after which the minister, and two churchwardens (if in England), and two elders (if in Scotland), shall sign the second certificate on the aforesaid paper: and the paper being in all things completed, shall be returned, addressed to the treasurer or paymaster of his majesty's navy, London, and he on receiving the same shall direct the inspector to examine it, and make such enquiry relative thereto as may appear to him necessary; and, if he shall be satisfied, to make out a certificate, stating the application of the party to his office, containing the party's description, and stating whether he is sole, or one of the next of kin of the deceased; the original place of residence of the deceased, and whether seaman or marine, and the name of the ship he belonged to, and that he died intestate, and whether bachelor or widow; together with the time of his death; and that appearing that no will of the deceased has been lodged in the office, he, therefore, grants such absolution of the application, and certifies, that he believes what is stated to be true; and that such party

may obtain letters of administration to the effect of the deceased, which appear not to exceed a sum specified, provided such party is otherwise entitled thereto by law: to which certificate there shall be subjoined a notice, that previous commission or requisition is to be addressed agreeably to the prescription of the within cover, in which the same is to be inclosed, and forwarded by the proctor, and when the commission or requisition shall be returned to the office, it will be forwarded to him, and he is then to sue out letters of administration, and send them to the inspector with his charge noted thereon. And then this certificate the inspector shall sign, and address to the proctor in Doctors Commons, and shall at the same time inclose therein a letter addressed to the minister and churchwardens, or elders (as the case may be), of the parish, within which the party then resides, franked by the treasurer, paymaster, or inspector, in which the previous commission or requisition is to be inclosed, informing him of the application attested by him, and the two churchwardens, or elders, and requiring him to swear the party accordingly, provided he answers the description contained in such commission or requisition; and when the same is executed, to return it to the pay office, and to specify and describe the receiver general of the land tax, collector of the customs, or of the excise, or the clerk of the check, whose abode is nearest to the party applying, when such person will be directed to pay him the wages due to the deceased; and desiring the minister, if the application

on was not attested by him as therein stated, to return the inclosed commission or requisition, that means may be taken to discover the imposition; and the proctor shall immediately, on receipt of such certificate inclosed in such letter, sue out the previous commission or requisition, and inclose it, with instructions for executing the same, in such letter, and shall transmit the letter by the general post to the minister and churchwardens, or elders, and they immediately on the receipt thereof shall proceed to the execution of such commission or requisition, and the same being so executed, shall transmit it to the treasurer or paymaster; and if the party applying shall reside at a distance from the place where the wages, pay, prize-money, or other allowance of money due the deceased, are payable, they shall specify and describe one of the persons enumerated in the letter, who may reside nearest to the party so applying, and the treasurer or paymaster shall immediately on the receipt thereof send the previous commission or requisition, so executed, to such proctor, who shall, without delay, sue out letters of administration in favour of the party so applying, to the estate and effects of such deceased person. The statute also prescribes similar regulations in regard to the grant of administration to a creditor of such intestate,

The provisions of this act, I have already mentioned, are extended by the stat. 32 Geo. 3. c. 67. to Ireland.

S E C T.



## S E C T. VII.

*Of administrations in case of the death of the administrator, or of the executor intestate.*

I AM now to consider the effect of the death of an executor, or administrator with regard to the administration.

3 4 Burn Eccl.  
L. 241. Ca.  
Temp. Talb.  
127.

Where administration is granted to two, and one dies, the survivor shall be sole administrator; for it is not like a letter of attorney to two, where, by the death of one the authority ceases, but it is an office analogous to that of an executor, which survives<sup>b</sup>.

b 3 Bac Abr. 56.  
2 Vern. 514.  
11 Vin. Abr. 69.  
Com. Dig.  
Admor (B. 7.)

An administrator is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust, and, therefore, on the death of that officer it results to the ordinary to appoint another. And, if A's executor die intestate, the administrator of such executor has clearly no privity or relation to A, since he is commissioned to administer the effects only of the intestate executor, and not of the original testator. In both these cases, therefore, it is necessary for the ordinary to commit another administration<sup>c</sup>.

c Com. Dig.  
Admor. (B. 6.)  
4 Burn Eccl.  
L. 241. 1 Roll.  
Abr. 907. 2 Bl.  
Com. 306.

But, with regard to the species of administration to be thus granted, a distinction arises between the

case

case where the executor, or next of kin had before his death taken out probate, or letters of administration; and where he had omitted to do so.

If an executor die before probate, his executor cannot prove, or take on himself the execution of the will of the original testator, because he is not thereby named executor to such testator. He only can prove the will, who by the will is constituted executor. The omission of the first executor to prove the same on his death determines, although it does not avoid the executorship, or vacate the acts, which he has performed in such character<sup>d</sup>.

d 11 Vin. Abr.  
67, 90, 111;  
1 Salk 308,  
309. Cro. Jac.  
614, pl. 4.

When this case occurs, an administration must be granted, and the grantee shall be the representative of the party who originally died: but it shall be an immediate administration, that is, without making mention of the executor, whether he did in point of fact administer, or not; because administering is an act in *pais*, of which the spiritual court cannot take notice. The ordinary must commit administration, as it appears to him judicially; and it can thus appear only by the probate<sup>e</sup>.

e 1 Salk. 308.  
3 Dec. Abr. 19.

In like manner, if A. dies intestate, and B. is entitled to administer, and dies before he takes out administration, an immediate administration shall be committed: in such case it shall be granted to the representatives of B. if the only party in distribution, in preference to the representatives of A. because by the statute of distributions B. had a vested

vested interest, and in such grant the ecclesiastical court regards the property; and therefore if a husband die intestate, without wife or child, leaving a father, and the father shall himself die before he takes out administration, it shall be committed to his representatives; and so it has been held in case the wife die intestate, and the husband die before he takes out administration, it shall be granted to the representatives of the husband; but it is now settled that the court is in the latter instance bound by stat. 31 E. 3. to grant administration to the next of kin of the wife, and then he shall be a trustee in equity for the husband's representatives<sup>a</sup>.

f 11 Vin. Abr.  
88. pl. 25. 1 P.  
Wms. 381. vid.  
also Com. Dig.  
Admor. (B. 6.)  
Show. 2, 25.  
vid. 1 Vern. 403.

g 3 Atk. 526.  
4 Burn Eccl.  
L 235. 11 Vin.  
Abr. 88. pl. 27.  
1 Vef. 16.  
1 Willf. 169. 1  
P. Wms. 382.  
not. 1.

If the deceased executor hath taken out probate, or the deceased's next of kin administration, then another species of administration, which hath not hitherto been mentioned, becomes necessary, namely, an administration *de bonis non*, that is of the goods of the deceased left unadministered by the former executor, or administrator, by the grant of which, such administrator *de bonis non* becomes the only personal representative of the party originally deceased<sup>b</sup>.

h 11 Vin. Abr.  
III. 2 P. Wms.  
340. Com. Dig.  
Admor. (B. 1)  
Plowd. 279  
3 Bac. Abr. 19.

i Com. Dig.  
Admor. (B. 6.)  
1 Ventr. 219.  
2 Lev 56.  
3 Bac. Abr. 19.

Administration of either species is, generally speaking, granted to the next of kin of such party. But in case there be a residuary legatee, it shall be granted to him in preference to such next of kin on the principle above stated, because the next of kin has then no interest in the property<sup>c</sup>. Thus where A. made C. executor and residuary legatee

B. made C. executor without giving him the  
 lus; and C afterwards died intestate: it was  
 that the administrator of C. should be admini-  
 strator *de bonis non* of A. but that the next of kin  
 B should be administrator *de bonis non* of B. <sup>11 Vin. Abr.</sup>  
 the residue be bequeathed to several persons, <sup>87. Prec. Chan.</sup>  
 an administration may be granted to all or either  
 them, as in the case of an original administrator,  
 though there be no present residue<sup>1</sup>. But for such  
 purpose there must be a complete disposition of  
 property<sup>m</sup>. If the executor be himself resi-  
 duary legatee, although he refused, or *before* he  
 received the will, died *intestate*, an immediate admini-  
 stration with the will annexed shall be granted  
 to his administrator<sup>n</sup>. If an executor be residuary  
 legatee, although he refused or died *before* probate,  
*upon a will*, his executor will be entitled to such  
 administration<sup>o</sup>. If an executor and residuary le-  
 gatee, *after* probate, die intestate, administration  
*de bonis non*, with the will annexed of the testator,  
 shall be granted to the administrator of such exe-  
 cutor. If a feme covert executrix die intestate, then  
 to the effects which she had in that capacity, ad-  
 ministration shall be granted to the residuary lega-  
 tee, if any, or to the next of kin of the testator.  
 If she were herself residuary legatee, it shall be  
 granted to her husband<sup>p</sup>.

<sup>11 Vin. Abr.</sup>  
<sup>87. Prec. Chan.</sup>

<sup>1 Com. Dig.</sup>  
<sup>Admor. (B. 6.)</sup>  
<sup>Vid. 2 Lev. 56.</sup>

<sup>m 11 Vin. Abr.</sup>  
<sup>89. Jo. 325.</sup>

<sup>n 11 Vin. Abr.</sup>  
<sup>88. 91. 2 Roll.</sup>  
<sup>Rep. 152.</sup>

<sup>o Com. Dig.</sup>  
<sup>Admor. (B. 6.)</sup>  
<sup>Dy. 372.</sup>

<sup>p 11 Vin. Abr.</sup>  
<sup>89. 91. 111.</sup>  
<sup>2 P. Wms. 161.</sup>  
<sup>4 Burn. Eccl.</sup>  
<sup>L. 236. 3 Salk.</sup>  
<sup>21. 11 Vin. Abr.</sup>  
<sup>90. 91. 93. 108.</sup>  
<sup>Fitzgibb. 203.</sup>  
<sup>Poph. 106.</sup>

Where there are two executors, of whom only  
 one proves, and dies, and then the other renounces,  
 the executors of the acting executor have no con-  
 cern with the administration of the goods unadmi-  
 nistered,



p Com. Dig.  
Admor. (B. 1.)  
Balk. 311.

nistered, but the same shall be granted to the next of kin, or residuary legatee of the first testator.

So, if there be two executors, one of whom appoints an executor, and dies, and the survivor dies intestate, the executor of the executor shall not intermeddle with the first testator's effects; for the power of his testator was determined by his death, and the executorship vested solely in the other executor as survivor.

So where an administrator is appointed during the minority of the executor of an executor, he has no authority to intermeddle with the effects of the original testator. The ordinary, in either case, shall commit administration *de bonis non*, to the next of kin or residuary legatee of the original testator.

q 11 Vin. Abr.  
67. in not. 89.  
Off. Ex. 107.  
Cro. Eliz. 217.  
3 Bac. Abr. 13.

## § E C T. VIII.

*How administration shall be granted—when void—when voidable—of repealing the same—how a repeal affects mesne acts.*

a 21 Vin. Abr.  
70. 1 Show.  
408, 409.  
Godolph. 231.  
Com. Dig.  
Admor. (B 7)

ADMINISTRATION is generally granted by writing under seal; it may also be committed by entry in the registry, without letters *sub sigillo*; but it cannot be granted by parol.

In letters of administration, the style of jurisdiction, as well as the name of the ordinary, shall be inserted <sup>b</sup>.

<sup>b</sup> 4 Burn  
Eccl. L. 329.

A party may refuse the office, nor can the ordinary compel him to accept it <sup>c</sup>.

<sup>c</sup> 4 Burn  
Eccl. L. 333.

Where administration is improperly granted, a distinction occurs between administrations which are void, and such as are only voidable.

If there be an executor, and administration be granted before probate, and refusal, it shall be void on the will's being afterwards proved, although the will were suppressed, or its existence were unknown <sup>d</sup>, or it were dubious who was executor, or he were concealed, or abroad <sup>e</sup>, at the time of granting the administration. Or, if there be two executors, one of whom proves the will, and the other refuses, and he who proved the will dies, and administration is granted before the refusal of the survivor, subsequent to the death of his co-executor; or, if granted before the refusal of the executor, although he afterwards refuse <sup>f</sup>, such administration shall be void. It shall also be void, if granted on the ground of the executors becoming a bankrupt, as it was before the stat. 38 Geo. 3. c. 87. if committed *durante minoritate*, where the infant executor had attained the age of seventeen <sup>g</sup>. So, also, it shall be void if granted by an incompetent authority, as, by a bishop, where the

<sup>d</sup> Com. Dig.  
Admor. (B. 1.)  
Flowd. 279.  
282.

<sup>e</sup> Com. Dig.  
Admor. (B. 1.)  
Moore 636.

<sup>f</sup> 11 Vin. Abr.  
68. 2 Lev. 182.

<sup>g</sup> Com. Dig.  
Admor. (B. 2.)  
B. 10 ) 2 Lev.  
182. Vid.  
1 Show. 411.

<sup>h</sup> 11 Vin. Abr.  
99. 5 Ca. 29. h.

the intestate had *bona notabilia*<sup>1</sup>, or, by an archbishop, of effects in another province<sup>2</sup>.

1 3 Bac. Abr.  
30 Com. Dig.  
Admor. (B. 3.)  
Salk. 36. 1 P.  
Wms. 44.  
k Hard. 216.

In all these instances the administration is a mere nullity. The executor's interest the ordinary is incapable of divesting. But there is another description of cases, where administration is not void, but voidable only by the act of the spiritual court, as, if administration be granted to a party not next of kin<sup>1</sup>, or to one of kin together with one not of kin, as, to a sister and her husband<sup>m</sup>, or to the wife's next of kin instead of the husband<sup>n</sup>; or, if it be granted on the refusal of an executor, who had before administered<sup>o</sup>; or, if it be granted, *non vocatis jure vocandis*, without citing the necessary parties<sup>p</sup>; or, to a stranger<sup>q</sup>; or, by fraud and misrepresentation, though otherwise duly granted<sup>r</sup>, as where the grantee, by false suggestions, prevented a party in equal degree from applying; or, in case administration be granted in consequence of the incapacity of the next of kin, and the incapacity be removed<sup>s</sup>; or, if the grantee shall become *non compos mentis*, or otherwise incapable<sup>t</sup>; or, if it be granted to a creditor before the renunciation of the next of kin<sup>u</sup>; it is not void, but voidable, and may be repealed.

l Com. Dig.  
Admor. (B. 6.)  
Salk. 38. 1 P.  
Wms. 43.

m Com. Dig.  
Admor. (B. 8.)  
Al. 36.

n 11 Vin. Abr.  
85. 1 Sid. 409.

o Com. Dig.  
Admor. (B. 8.)  
Off. Ex. 40. 41.

p 11 Vin. Abr.  
115 Com. Dig.  
Admor. (B. 8.)  
1 Lev. 305.

q 11 Vin. Abr.  
95. Moore 396.

r 11 Vin. Abr.  
114. 117.  
Fitz Gibb. 303.

s 11 Vin. Abr.  
115. 1 Sid. 373.

t 11 Vin. Abr.  
115, 116.

u Com. Dig.  
Admor. (B. 6.)

1 Salk. 38. 4.  
Burn. Eccl. L.  
249. Stra. 911.

w Com. Dig.  
Admor. (B. 8.)  
1 Lev. 56. 1.  
Ventr. 219.

If there be a residuary legatee, and administration be granted to the next of kin, though not void, it may also be repealed, whether there be any present residue, or not<sup>v</sup>.

Although



Although a feme covert die entitled to several debts due to her before marriage, which by law do not belong to the husband, and her next of kin appear, and take out administration, it shall be repealed, and administration granted to the husband.

2 11 Vin. Abr.  
98 in not. 114.  
12 Mod. 432.

If there be two grants of administration, one by the metropolitan, and the other by the bishop, where there were not *bona notabilia*, the prerogative administration may be repealed.

7 11 Vin. Abr.  
114. Cro. Eliz.  
283. Com. Dig.  
Admor. (B. 6)

At common law the ordinary might repeal an administration at his pleasure, but now, since the stat. 21 H. 8. if administration be regularly granted to the next of kin, according to the provisions of the same, the ordinary has no such discretion. If he assign a cause for a repeal, the temporal courts are to judge of its sufficiency. Thus, it was held, that, where the ordinary had elected to grant administration to the father, he had no power of repealing the administration at the suit of a party alleging herself to be the widow.

2 11 Vin. Abr.  
114. 4 Burn  
Ecol. L. 248.  
249. Com. Dig.  
Admor. (B. 6.)  
1 P. Wms. 42.  
fed. vid. Skinner 136.

So where administration was granted to a sister, a married woman, pending a caveat entered by the brother, on appeal, it was adjudged, that the administration should not be revoked at his suit.

2 Raym. 93.  
3 Salk. 22. 11  
Vin. Abr. 115.  
1 Kebl. 667.  
683. 1 Sid. 179.

And, where administration was granted to the younger brother, and the elder sued to repeal it, the decision was the same; but, in that case, it

b 11 Vin. Abr.  
115. 1 Lev.  
186.

was



a 11 Vin. Abr.  
116. 2 Kebl.  
312. Fitzgibb.  
303.

d 11 Vin. Abr.  
116. 12 Mod.  
328.

e 11 Vin. Abr.  
160, 116. 3  
Mod. 23, 25.  
Skin. 155.

f 11 Vin. Abr.  
116. 12 Mod.  
426, 428.

was intimated it would have been different if the administration had been granted pending a caveat. Nor, if administration be granted to a creditor and, afterwards, a creditor to a larger amount appear, shall it be revoked for him<sup>d</sup>. So, where administration, during the infancy of the intestate's sister, was committed to the great grand-mother, and, though the grandfather, the plaintiff in prohibition, suggested, that the administration was granted by surprize, and, that as he was nearer of kin, it ought to be granted to him; the court thought, in this instance, propinquity to be no ground of preference, and, since the ordinary had no power at common law to grant such administration in the case of an infant next of kin, but only in that of an infant executor, having once executed his authority, the grant ought not to be repealed<sup>e</sup>. So where A., an infant, was made executor, and residuary legatee, and, if he died under age, then B., another infant, was appointed residuary legatee, and, on the like contingency, the residue was bequeathed to C.; administration, during the minority of A., was granted to M. his mother; A. died intestate under age, B. was still an infant, and on the question whether the administration might be repealed, and granted to C. the court seemed to be of opinion, that the ordinary had executed his authority, and that M. should not be divested of the administration during the infancy of B.<sup>f</sup>.

So

So also administration *de bonis non*, with the will annexed, granted to one, where two had equal right is good, and shall not be revoked<sup>2</sup>.

2 11 Vin. Abr.  
116. 2 Ja. 16.

But, in general, if administration be granted to wrong party, in such case the ordinary may recall it, and grant it to another, for he has not executed his authority, and it is a power incident to every court to rectify its errors<sup>1</sup>.

h 11 Vin. Abr.  
111. 4 Burn  
Eccl. L. 242,  
249. Com. Dig.  
Admor. (B. 3.)  
1 P. Wms. 42.  
fed. vid. Skinner 156.

Therefore, where a feme covert had died intestate, and her next of kin had obtained administration, it was adjudged, that it should be repealed at the suit of the husband, because the ordinary had no power, or election to grant it to any other than to him<sup>1</sup>.

1 11 Vin. Abr.  
116. 4 Burn.  
Eccl. L. 248.  
3 Salk. 22.

If the administration be repealed for want of form in the grant, in such case the ordinary must re-grant it to the same party, although there be others in equal degree<sup>1</sup>.

k 11 Vin. Abr.  
115. 1 Sid. 293.

If administration be repealed *quia improvide*, that is, where, on a false suggestion in respect to the time of the intestate's death, it issued before the expiration of a fortnight from that event; or where the court on committing it took security inadequate to the value of the property, it shall be granted to the same person<sup>1</sup>.

1 Com. Dig.  
Admor. (B. 3.)  
1 Sid. 293.

Nor can the ordinary revoke the grant on account of abuse, although the letters were issued after

m 11 Vin. Abr.  
115. Com. Dig.  
Admor. (B. 8.)  
1 Vent. 219.  
n 11 Vin. Abr.  
116. Sty. 102.

after a caveat entered, for he ought to take sufficient caution in the first instance to prevent maladministration<sup>m</sup>. Nor can he revoke it on the administrator's omission to bring in an inventory and account<sup>n</sup>.

o 11 Vin. Abr.  
114. 3 Co.  
78 b.

If the grant regularly issues, and subsequent letters of administration are obtained by collusion, such subsequent letters are void, and shall not repeal the former administration<sup>o</sup>.

p 11 Vin. Abr.  
114. 4 Burn.  
Ecl. L. 249.  
q 11 Vin. Abr.  
115. in not.  
Cro. Eliz. 315.

Some authorities maintain, that if the ordinary commit administration to the wrong party, and then commit it to the right, the second grant is a repeal of the first without any sentence of revocation<sup>p</sup>; but in other cases it is held, that the first is not avoided except by judicial sentence<sup>q</sup>. And the practice is, to call in and revoke the first administration before the second is granted. But after an administration by an archbishop, if the bishop to whom it belongs grant administration, and then the first administration be repealed, the administration granted by the bishop before the repeal shall stand good<sup>r</sup>.

r Com. Dig.  
Admor. (B. 3.)  
8 Co. 135 b.

So, in all cases where the first administration is repealed, the second shall be valid, though committed after the grant of the first, and before the repeal of it<sup>s</sup>.

s Com. Dig.  
Admor. (B. 3.)  
Vid. 2 Brownl.  
119.

If the ecclesiastical courts, in the granting or repealing of administrations, shall transgress the bounds



bounds which the law prescribes to them, a prohibition from the temporal courts shall be awarded, as in the case above-mentioned, where the ordinary has granted a regular administration, and is proceeding to repeal it on insufficient grounds, such as mal-administration<sup>b</sup>, or that the letters issued after a caveat entered<sup>c</sup>: but no prohibition to the ecclesiastical courts shall issue on suggestion that they are about to repeal an administration granted by surprize, or that they refused to commit the administration to the intestate's next of kin, but were proceeding to grant it to another; for the point, who is in fact next of kin, is of spiritual cognizance, and must be contested before the spiritual jurisdiction<sup>d</sup>.

b 1 Vent. 219.  
Al. 56.  
1 Lev. 186.  
Dub. 1 Sid 371.  
1 Lev. 187. et  
vid. sup. 93.

d 1 P Wms. 43.  
2 Bl. Com. 112.  
11 Vin. Abr 92.  
115. Com. Dig.  
Admor. B. 7. 2.

How far the repeal of an administration affects the intermediate acts of the former administrator, remains now to be considered.

And here he must again recur to the distinction between such administrations as are void, and such as are only voidable. If the grant be of the former description, the mesne acts of such administrator shall be of no validity; as, if administration be committed on the concealment of a will, and afterwards a will appear; inasmuch as the grant was void from its commencement, all acts performed by the administrator in that character shall be equally void<sup>e</sup>. Or if administration be granted before the refusal of the executor, a sale by the administrator of the testator's effects shall be void, although the

e Com. Dig.  
Admor. B. 10.  
2 Law 182  
3 Bac. Abr. 50.

H executor



f 11 Vin. Abr.  
95. 2 Med. 146.

g Com. Dig.  
Admon. B. 10.  
1 Leon. 90.  
11 Vin. Abr. 94.

h Com. Dig.  
Admon. B. 10.  
Dyer 339.  
6 Co. 19.

i 6 Co. 18. b.

k 3 Term Rep.  
129. 11 Vin.  
Abr. 117.

executor afterwards appear and renounce<sup>f</sup>. Or, if the executor omit proving the will, whereby administration is granted to a debtor, the executor may afterwards prove it, and then sue the administrator for the debt, which is not extinguished by the administration<sup>g</sup>. So, where an administratrix sued a debtor of the intestate, and, pending the suit, another by fraud procured a second administration to himself jointly with her, and after judgment released to the debtor, on which he brought an *audita querela*, and in the mean time the second administration was revoked, the release was held to be of no avail<sup>h</sup>.

Thus in all other cases, the acts of the administrator are of no effect where the administration is unlawful *ab initio*.

If the grant were only voidable, then another distinction arises between the case of a suit by citation, which is to countermand, or revoke, former letters of administration; and on appeal, which is always to reverse a former sentence<sup>i</sup>.

In case of an appeal such intermediate acts of the administrator shall be ineffectual, because, as we have before seen, the appeal suspends the former sentence, and on its reversal it is as if it had never existed<sup>k</sup>.

But if administration be only voidable, and the suit be by citation, all lawful acts by the first administrator

ministrator shall be valid, as a *bonâ fide* sale, or a gift by him of the goods of the intestate; and such gift shall be available, even if it were with intent to defeat the second administrator, or were made *pendente lite*, on the citation; although by the stat.

13 Eliz. c. 5. it be void as to a creditor. So, if administration be committed to a creditor, and afterwards repealed on citation at the suit of the next of kin, such creditor shall retain against the rightful administrator, and his disposal of the goods pending the cause, and before sentence of repeal, shall be effectual. If an administrator assign a term, and on a subsequent citation to repeal the administration, it is confirmed, and on appeal the sentence is reversed, the assignment shall be good, for the repeal is merely of a sentence on citation, and therefore of the nature of a suit on such process, consequently the effect is the same as if the first administration had been avoided in such suit, and not as if an appeal had been brought in the first instance.

1 Com. Dig.  
Admor. B. 9.  
1 Salk. 38.  
6 Co. 18. b.  
11 Vin. Abr. 95.

1 Salk. 38.  
11 Vin. Abr.  
117. 1 Ventr.  
219.

2 Raym. 224.  
2 Lev. 90.  
11 Vin. Abr.  
118.

But where an administrator sold a term in trust for himself, although the administration were revoked on a suit by citation, and not on an appeal, the assignment was decreed to be set aside.

6 11 Vin. Abr.  
95. 2 Chan. Ca.  
129.

Whether the administration be void or voidable, a *bonâ fide* payment to the administrator of a debt due to the estate shall be a legal discharge to the debtor, by analogy to the case before stated in regard to such payment under probate of a forged

p Allen v.  
Dundas,  
3 Term Rep.  
125. Supr. 51.

will'. So in a case as early as the time of Charles the Second, where the administrator of the lessee paid rent to the administrator of the lessor, and the latter administration was repealed, and granted to A. and he brought an action as well for the rent paid to the former administrator of the lessor, as for rent which accrued due subsequent to the repeal, and obtained a verdict and judgment for the same, the defendant was relieved in equity in regard to the rent he had paid, inasmuch as he had paid it to the visible administrator<sup>1</sup>.

q 11 Vin. Abr.  
117. Fin. Rep.  
40.

This, however, is to be understood only where the grant is revoked on citation; if it be reversed on appeal, the administrator's authority was suspended by the appeal, and of course such payments shall be void.

But whether the administration be void, or voidable, or be revoked on citation, or appeal, if an action be brought by the administrator, and, while it is pending, administration is committed to another, the writ shall be abated<sup>2</sup>.

r 11 Vin. Abr.  
114. Bro.  
Admor. pl. 3.

Or, if the administrator before the repeal obtain a judgment for a debt due to the intestate, he is not entitled to take out execution, but the defendant may avoid the judgment by an *audita querela*<sup>3</sup>. So, if the defendant be actually in execution, the judgment shall be vacated in the same manner, and the execution set aside<sup>4</sup>: for in such cases the plaintiff had no authority but by virtue of

s 11 Vin. Abr.  
102. 117. Com.  
Dig. Admor.  
B. 10. 2 Sand.  
149. 1 Mod. 62.  
Lutw. 343.

t 11 Vin. Abr.  
117. Yelv. 125.  
u Bac. Abr. 51.



of a commission from the ordinary, and when that is determined, his authority is determined with it. But on affidavit to stay execution on a judgment recovered by an administrator, on the ground that the letters of administration were repealed before the judgment entered, it was held that the matter did not come legally in question before the court, and that the party ought to bring an *audita querela*.

8 11 Vin. Abr.  
117. Sty. 417.

If administration be granted, and afterwards an executor appear, if the administrator hath paid debts, legacies, or funeral expences, he shall be allowed to deduct such payments in the damages recovered against him in an action by the executor.

W 3 Bac. Abr.  
50. Plowd. 282.

of a commission from the court, and after that  
a statement, as already mentioned, was  
submitted to the court on a motion  
for an adjournment on the ground that  
the state of administration was repeated before  
the judgment entered. It was held that the matter  
did not come legally in question before the court,  
and that the party ought to bring a writ of

Writ of Habeas Corpus  
No. 111

If administration be granted, and afterwards an  
executor appear, the administrator shall be paid  
debts, legacies, or funeral expenses, he shall be al-  
lowed to deduct such payments in the damages re-  
covered against him in an action by the executor.

Writ of Habeas Corpus  
No. 112

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## BOOK II.

### OF THE RIGHTS AND INTERESTS OF EXECUTORS AND ADMINISTRATORS.

#### CHAP. I.

OF THE GENERAL NATURE OF AN EXECUTOR'S OR ADMINISTRATOR'S INTEREST—DISTRIBUTION OF THE SUBJECT WITH REFERENCE TO THE DIFFERENT SPECIES OF THE DECEASED'S PROPERTY.

**A**N executor, or administrator represents the person of the testator, or intestate, in respect to his personal estate: the whole of which, generally speaking, vests in the executor immediately on the testator's death: in the administrator on the grant of letters of administration<sup>a</sup>; and such grant hath relation to the time of the intestate's decease<sup>b</sup>.

<sup>a</sup> Com. Dig. Admon. B. 10, 11 Co. Litt. 209. 3 Bac. Abr. 57. Off. Ex. Suppl. 47.

<sup>b</sup> Com. Dig. Admon. B. 11. Roll. Abr. 554.

The interest which such representative takes in the deceased's property is very different from that which belongs to him in regard to his own. Instead of being an absolute interest, it is only temporary, and qualified. He is not entitled in his own right, but *in autre droit*, in right of the deceased. He is entrusted merely with the custody, and distribution of the effects<sup>c</sup>.

<sup>c</sup> Off. Ex. 85. 88. Plowd 525. 11 Vin. Abr. 54. 9 Co. 85. b.

Hence,



Hence, if an executor be attainted of felony, or treason, he incurs a forfeiture of all his own goods and chattels, but those of which he is possessed as executor shall not be forfeited.

e Off. Ex. 86.  
Vid. 3 Roll  
Abr. 58 pl. 8.  
1 Leon. 263  
Shep. Touch.  
94.  
d Ld. Raym.  
1307.

If he grant all his property, such as belongs to him in the character of executor shall not pass, unless he be so named in the grant<sup>c</sup>, or unless he have no other property<sup>d</sup>.

e 3 Burr. 1369.  
1 Atk. 158.  
f 11 Vin. Abr.  
272. Com. Dig.  
Admon. B. 10.  
Off. Ex. 86.  
R. Farr v.  
Newman,  
4 Term Rep.  
625. 1 Muller J.  
contra. See  
also Whale v.  
Booth. *ibid.*  
623. in not.  
g Vid. Farr v.  
Newman, and  
also Quick v.  
Staines, 1 Bos.  
and Pull. 293.

If he become bankrupt, the commissioners cannot seize the specific effects of the testator, not even in money, which specifically can be distinguished, and ascertained to belong to the deceased, and not to the bankrupt himself<sup>e</sup>. Nor can the testator's goods be taken in execution for the executor's debts, either on a recognizance, statute, judgment, or for his debts of whatever nature<sup>f</sup>, unless there be sufficient evidence, either direct, or presumptive, of the executor's having converted the goods to his own use<sup>g</sup>.

Therefore, where an executor brought an action in the Court of Exchequer, suggesting that the defendant detained from him one hundred pounds, which he owed to him as executor of J. S. whereby he was the less able to pay a debt due from himself to the crown; the writ was abated, because the court would not intend that the king's debt could be satisfied by a judgment recovered by the plaintiff in that capacity<sup>h</sup>.

Nor

Nor can an executor bequeath the effects which he holds in that right<sup>2</sup>. And if he die without a will, his administrator shall not, as we may remember, intermeddle with the testator's estate. Nor if an executor die in debt, shall the effects of the testator be liable in the hands of the executor's representative, to the payment of the executor's debts<sup>3</sup>.

2 13 Vin. Abr.  
431. Plowd.  
525. Off. Ex.  
86.

h Off. Ex. 86.

So, if an executrix marry, all the personal chattels of which she is possessed in her own right, are of course absolutely vested in the husband. But in respect of the goods of the testator, they are not transferred by the marriage<sup>4</sup>.

1 Off. Ex. 87.

Nor if the husband of an executrix sue jointly with her for a debt due to her in that character, and she die after judgment, and before execution, can the husband have execution on the judgment; for although he were privy to the judgment, yet he shall not recover the debt, because it belongs to the testator's representative<sup>5</sup>. Nor shall a term in the hands of the husband in right of his wife as administratrix be extendible for his debt<sup>6</sup>.

1 1 Roll. Abr.  
889. tit. Execution.

1 1 Cro. Eliz.  
291.

But where A, appointed his widow executrix, who continued in possession of his goods during three months after his death, and at the end of that time married B.; and, for half a year after the marriage, the goods were treated by them both as the goods of B. it was held, that they might be taken in execution at the suit of B.'s creditor<sup>7</sup>.

Such

in Quick v. Staines, 1 Bos. & Pull. 293.

Such is the nature of the interest to which an executor or administrator, is entitled in that right, and so distinguishable is it from that which pertains to him in his own.

The personal property in which they are, thus respectively interested, that is of a saleable nature, and may be converted into ready money, is called assets in the hands of the executor or administrator, that is, sufficient, from the French *assez*, to make him chargeable to a creditor, and legatee, or party in distribution, so far as such goods and chattels extend.

2 Bl. Com.  
310. Off. Ex.  
Suppl. 33.

The personal effects comprehend so wide a circle, that in order to view them with any distinctness, it is necessary they should be arranged in a variety of classes,

I shall therefore first consider them as distinguished into chattels real, and chattels personal, in the deceased's possession at the time of his death.

I shall then treat of such as were not in his possession. And,

Among such as were not in his possession, of things in action, as well those where the cause of action accrued in his life-time, as those where it accrued after his death.

I shall then proceed to the examination of such chattels as vest in the executor or administrator, by

condition, by remainder, or increase, by assignment, by limitation, and by election.

I shall next enquire what chattels go to the heir, accesssor, devisee, or remainder-man.

Then shew to what the widow shall be entitled.

Then describe the nature of the interest of a donee *mortis causa*.

And, lastly, point out how effects which an executor or administrator takes in that character may become his own.

## CHAP. II.

OF THE INTEREST OF AN EXECUTOR OR ADMINISTRATOR IN THE CHATTELS REAL AND PERSONAL.

### SECT. I.

*Of his interest in the chattels real.*

**FIRST**, the personal representative is entitled to the chattels real, that is, such as concern or favour of the realty, as terms for years of houses, or land, mortgages, the next presentation to a church,



church, estates by statute merchant, statute staple, or elegit, interests for years in advowsons, commons, fairs, corodies, estovers, profits of leets, and the like. This species of chattels is styled by the civil law immoveable goods, and, inasmuch as they are interests issuing out of, or annexed to real estates, in the immobility of which they participate, by our law they are described as real. And also, as the utmost period of their existence is fixed and limited, either for such a space of time certain, or till such a particular sum be raised out of such a particular income, and consequently are distinguishable from the lowest estate of freehold, the duration of which is necessarily indeterminate, they are denominated chattels<sup>a</sup>.

<sup>a</sup> 2 Bl. Com. 386. 3 Bac. Abr. 57, 58, 60, 61. Off. Ex. 53. 54. 11 Vin. Abr. 173, 227. Cro. Jac. 371. Off. Ex. Suppl. 59. b 11 Vin. Abr. 240. 2 Brownl. 47. c Vin. Abr. 233. 1 Chan. Ca. 257.

Lands devised to an executor for a term of years for payment of debts, are assets in his hands<sup>b</sup>.

Leases are likewise assets to pay debts, although the executor assent to the devise of them<sup>c</sup>. And in case a term be devised to the executor, and he enter, and die before probate, the term shall be deemed to be legally vested in him by his entry, and the devise executed without the probate<sup>d</sup>. So a lease for years determinable on lives is a chattel interest, and shall vest in the personal representative of such lessee<sup>e</sup>.

<sup>d</sup> Dyer 367. 2. <sup>e</sup> Off. Ex. 54.

If an estate be granted to A. *pur autre vie*, but not limited to his heirs, and A. die in the life-time of the *cestui que vie*, or of him by whose life it is holden

holden, as there is no special occupant, the heir not being named in the grant, it shall by the stat. 9 Car. 2. c. 3. go to the executor, and be assets in his hands for payment of debts, and after payment of the same, the surplus of such estate, by the stat. 4 Geo. 2. c. 20. shall go in a course of distribution like a chattel interest<sup>f</sup>. These statutes operate equally on grants of estates *pur autre vie* in incorporeal hereditaments; as if rent be granted to A. during the life of another, the rent by virtue of these provisions has been holden to continue in the representatives of the grantee dying in the life-time of the *cestui que vie*<sup>g</sup>.

<sup>f</sup> 1 Bl. Com. 120, 258, 259, 260.

<sup>g</sup> Harg. Co. Litt. 41. b. Fearn's Con-ting. Rem. 232, 233. 3 P. Wms. 264. in not. Barnard-ist. 46. Vid. also stat. 5 Geo. 2. c. 17. 2d vid. 2 Bl. Com. 260. Vaugh. 201.

<sup>h</sup> Dep on dem. Shore v. Porter, 3 Term Rep. 113. Vid. also Gulliver on dem. Tasker v. Burr. 1 Black. Rep. 596. 6 Term Rep. 295.

<sup>i</sup> Off. Ex. 53. 11 Vin. Abr. 166. Harg. Co. Litt. 8. not. 10. <sup>k</sup> Bac. Abr. 57. 11 Vin. Abr. 230. pl. 42. 8 C. 5 Co. 31. Off. Ex. Suppl. 55. 2d vid. Cio. Jac. 343.

In case of a tenancy from year to year as long as both parties please, if the tenant die intestate, the same interest as the deceased had shall devolve on his administrator<sup>h</sup>.

If the testator were lessee for years, fish, rabbits, deer, and pigeons, shall belong to his executor as necessary chattels, partaking of the nature of their respective principals, namely, the pond, the warren, the park, and the dove house<sup>i</sup>.

If an executor had a lease for years of land of the annual value of twenty pounds, rendering a rent of ten pounds a-year, it shall be assets only for the ten pounds over and above the rent<sup>k</sup>.

A reversion of a term is vested in the executor immediately on the testator's death, and shall be assets

1 11 Vin. Abr.  
240. 2 Jo. 170.

m 3 Bac. Abr.  
58. 2 Chan. Ca.  
208.

x Off Ex.  
Suppl. 35.  
11 Vin. Abr.  
227. pl. 16. 21.

y 1 Co. 87. b.  
11 Vin. Abr.  
229.

assets in his hands for its utmost value<sup>1</sup>. If an executor renew, the new lease as well as the old shall be assets<sup>m</sup>. If A. be possessed of a term as executor, and he purchase the reversion in fee, he is still chargeable for the assets in respect of the term, although it be extinguished, so that it shall be incapable of vesting in his executor<sup>x</sup>. So, if the executor of the lessee surrender the lease, he shall be considered as assets, although the term be extinct<sup>y</sup>.

So, where A. seised of land in fee devised it to B. for thirty-one years, for payment of debts, and appointed B. his executor, and, during the term the fee descended on B.; it was adjudged, that although by the descent of the inheritance, the term as merged as to him, yet that it was in effect as to creditors and legatees, and should be assessed in his hands<sup>z</sup>.

z 11 Vin. Abr.  
229. Off Ex.  
Suppl. 76.

If A. has a term in right of his wife, as executrix, and he purchases the reversion, the term is extinct as to her, though she survive, but, in regard to a stranger, it shall be considered as assets in her hands<sup>a</sup>. But, where A. on his marriage demised lands to B., and B. re-demised them to A. for a shorter term, subject to a pepper-corn rent during the life of A., and, after his death, to an annual sum for the life of his wife, as her jointure, and a pepper-corn rent for the remainder of the term, and A. died, it was held, that the re-

a 11 Vin. Abr.  
236. Moore  
54.



If a term should not be assets to pay any of his debts, except such as affected the inheritance, inasmuch as such term was raised for a particular purpose<sup>b</sup>. So, where A. on the marriage of his son B. settled a lease for years on him for life, and on the wife for life, and then on the issue of the marriage, and B. covenanted to renew the lease from time to time, and to assign it on the same trust, and B. renewed the lease in his own name, but made no assignment to the trustees, and died; the lease was held to be bound by the agreement on the marriage, and that it was not assets, nor liable to his debts<sup>c</sup>. Nor, where a lease for years is granted on condition to be void on nonpayment of rent, and the condition is broken, and the lessee afterwards dies, shall it be assets in the hands of his executor<sup>d</sup>. Nor is the trust of a term, made assets by the statute of frauds, in the hands of the executor of *cestuy que trust*<sup>e</sup>.

<sup>b</sup> 11 Vin. Abr. 236. 2 Vern. 32.

<sup>c</sup> 11 Vin. Abr. 237. 2 Vern. 298.

<sup>d</sup> 11 Vin. Abr. 228. 2 Leon. 143.

<sup>e</sup> Vid. 11 Vin. Abr. 136. 2 Vern. 248.

If the testator die in possession of a term for years, it shall vest in the executor; and, although it be worth nothing, he cannot waive it, for he must renounce the executorship in *toto*, or not at all<sup>f</sup>. But this is to be understood only where the executor has assets, for he may relinquish the lease, if the property be insufficient to pay the rent; but in case there are assets to bear the loss for some years, though not during the whole term, it seems the executor is bound to continue tenant, till the fund is exhausted, when, on giving notice to the lessor, he may waive the possession<sup>g</sup>.

<sup>f</sup> Com. Dig. Admon. B. 4. B. 10. 1 Sid. 266. 1 Salk. 297. 1 Lev. 127. 1 Ventr. 271.

<sup>g</sup> Off. Ex. 120. vid. infr.

An



h 11 Vin. Abr.  
233. 237. 2  
Ventr. 358.  
4 Mod. 226.  
4 Burn Ecdl.  
L. 195.

i 11 Vin. Abr.  
239. 2 P.  
Wms. 621.

k 11 Vin. Abr.  
436. pl. 27, 28.  
Cro. Car. 506.

l 3 Bac. Abr.  
61. Off. Ex. 54.  
2 Bl. Com.  
252. 4 Bl.  
Com. 285. 11.  
Vin. Abr. 175.  
m Off. Ex. 53.  
Off. Ex. Suppl.  
119. 3 Bac.  
Abr. 62.

An estate, in fee, in the plantations, is subject to debts, and esteemed as a chattel, till the creditors are satisfied, when the lands shall descend to the heir <sup>h</sup>. A leasehold estate in Ireland is considered as personal estate in England; but, whether a leasehold estate in Scotland is to be regarded in the same light, seems not to be settled <sup>i</sup>.

A grant of the next presentation to a living to J. S. during his life, is limited, and shall not carry the presentation to his executors, on his dying before the church becomes void <sup>k</sup>.

Among chattels real is also to be classed, the interest styled in law, the *annum, diem, et vastum*, the year, day, and waste, that is, where a party who is not tenant to the king, is attainted of felony, all his lands, and tenements in fee simple, are, after his death, forfeited to the crown, for a year and a day; and the king, or his grantee, and therefore his executor, during such period, hath not only a right to take the rents and profits of the estate, but also to commit upon it whatever waste he pleases <sup>l</sup>.

If rent be reserved on a lease for years, and the lessor die, the rent in arrear, at the time of his death, shall go to his executor <sup>m</sup>.

A lessee for years hath only a special interest, and property in the fruit, and shade of timber trees, so long as they are annexed to the land, but he hath a general property in hedges, bushes, and trees,

not

not timber", and, consequently, the same interest shall vest in his executor. If he be lessee, without impeachment of waste, in that case, he has a general property, as well in timber trees as others; but, unless they are severed during the term, they shall not belong to him, or to his executor, but the lessor, as annexed to the freehold.

n Com. Dig.  
Biens. H.  
4 Co. 62. b. Dy.  
90. b. 1 Roll.  
Rep. 181.

Where such chattels concern corporeal hereditaments, as leases for years of houses or lands, the executor is not deemed to be in possession of them, till he has actually entered. But, in regard to such chattels as relate to incorporeal hereditaments, as leases of tithes, the possession of the executor is necessarily constructive, because on them there can be no entry. At the instant therefore, that the tithes are set out, in a place however remote, he shall be possessed of them in contemplation of law.

o Off. Ex. 108,  
109. 11 Vis.  
Abr. 240.

If the lease be of a rectory, consisting not only of tithes, but also of glebe lands, then, it appears, that the executor is not in possession of the tithes, unless he enter upon the lands.

p Off. Ex. 109.

The executor of tenant, from year to year, of an estate under the annual value of ten pounds, may gain a settlement by residing on it for forty days.

q The King v.  
the inhabitants  
of Stone, 6  
Term Rep. 295.

## S E C T. II.

*Of his interest in the chattels personal, animate, vegetable, and inanimate.*

SECONDLY. Chattels personal are such things as are annexed to, or attendant on, the person of the owner; and these, by the civil law, are denominated moveable. They are, also, to be distinguished into animate, vegetable, and inanimate.

a 2 Bl. Com.  
387, 389. Off.  
Ex. 55, 56, 57.

The animate are also divided into such as are *domita*, and such as are *fera natura*, some being of a tame, and others of a wild disposition. Those of a nature tame and domestic, are sheep, horses, kine, bullocks, poultry, and the like, are capable of an absolute property, and are transmissible like all other personal chattels, to an executor. Those of a wild nature, as deer, hares, rabbits, pigeons, pheasants, partridges, and hawks, admit only of a qualified ownership. Therefore, unless they are reclaimed, that is, rendered tame by art, industry, and education, or confined so that they cannot escape, and enjoy their natural liberty, or unless they are incapable, through weakness, of flying, or running away, they are *nullius in bonis*, and are not regarded in the light of private property, and consequently cannot pass to representatives\*. But the animals, I have just enumerated, provided they are tame, shall belong to the executor. He shall

b 2 Bl. Com.  
390, 391.  
Com. Dig.  
Rens. A. 2.

so, be entitled to them, although not tame, if they be taken, and kept alive in any room; cage; or other receptacle. Nor can an absolute property exist in fish, at large in the water; but, fish in a tank, shall go to the executor. Also, hawks, crows, and other birds, rabbits and other creatures, in nests, or burrows, if too young to fly, or run away, are all to be classed among personal chattels.

c Off. Ex. 53.

57.

d Off. Ex. 53.

2 Bl. Com. 393.

e Off. Ex. 57.

3 Bl. Com. 394.

Of the same description are hounds, greyhounds, and spaniels, and, as accessory to such chattels, a hunter's horn, and a falconer's lure.

f Off. Ex. 53.

And, since the executor's interest is co-extensive with that which was vested in the testator, the property in all his animals, however minute; in point of value, shall go to the executor, as house-dogs, ferrets, and the like; or although they were kept only for pleasure, curiosity, or whim, as lap-dogs, squirrels, parrots, and singing-birds.

g 3 Bac. Abr.

57. Off. Ex. 52.

h 2 Bl. Com.

393.

An executor shall, likewise, be entitled to deer in a park, hares, or rabbits, in an enclosed warren, doves in a dove-house, pheasants, or partridges, in a mew, fish in a private pond, and, according to Bracton, to bees in a hive; if, as we have before seen, the testator were lessee for years of the premises, to which they respectively belong.

Supr. 167.

i 2 Bl. Com.

393. Off. Ex.

53. Harg. Co.

Litt. 2. not. 10.

I s

These



These various animals are no longer the property of an individual, or transmissible to his representative, than while they continue in his possession. If they obtain their natural freedom, his property instantly ceases, unless they have *animus revertendi*, which is to be known only by their custom of returning. The law, therefore, extends this possession farther than the mere manual occupation. The qualified property in a tame hawk is not divested by his pursuing his quarry in the presence of the sportsman, nor in pigeons, especially of the carrier kind, by their flying at a distance from their home; nor in deer, by their being chased out of a park, or forest; nor in bees, by their flying from the hive, if they are immediately pursued by the keeper, forester, or owner. If they stray or fly without the knowledge of the owner, and return not in the usual manner, they are free, and open to the first occupant. But, if a deer, or any wild animal reclaimed, hath a collar, or other mark upon him, and goes and returns; at his pleasure, the owner's property in him still continues; but, if the deer has been long absent, without returning, such property shall cease<sup>k</sup>.

<sup>k</sup> 2 Bl. Com.  
392. Com. Dig.  
Biens. F.  
7 Co. 17. b.

Personal effects, of a vegetable nature, are the fruit, or other parts of a plant, or tree, when severed from the body of it, or, the whole plant, or tree itself when severed from the ground; as apples, or pears, which are gathered or fallen, grass which is cut, and trees, or their branches, which are felled or lopped<sup>l</sup>.

<sup>l</sup> 2 Bl. Com.  
389. Off. Ex.  
59.

There

There are, also, various vegetables, styled in law emblements, which are deemed personal, and belong to the executor, although they are affixed to the soil. They are so classed when they are raised annually by labour and manurance, which are considerations of a personal nature. The appellation of emblements, properly speaking, signifies the profits of sown land, but, in a larger sense, it extends to roots planted, or other annual artificial profit; it includes corn growing, hops, saffron, hemp, flax, and, as it seems, clover, saint-foin, and every yearly production in which art, and industry must combine with nature<sup>n</sup>.

2 Bl. Com.  
123, 124.  
Termes de la  
ley Embl.  
Off. Ex. 59.  
4 Burn Eccl.  
L. 255. Com.  
Dig. Biens.  
G. 1. Hargr.  
Co. Litt. 55. b.

On the same principle melons, cucumbers, artichokes, parsnips, carrots, turnips, and the like, belong to the executor<sup>n</sup>. The executor of tenant for life has also been held entitled to hops, although growing on ancient roots, as in the nature of emblements in respect of the cultivation, which is necessary to produce them<sup>o</sup>. Manure in a heap, before it is spread on the land, is also a personal chattel<sup>p</sup>.

4 Burn Eccl.  
L. 254. 2 Bl.  
Com. 123.  
Roll. Abr. 728.  
Hargr. Co.  
Litt. 55. b.  
not. 1. Cro.  
Car. 515.

p 11 Vin. Abr.  
175. 847. 66.

Personal chattels inanimate are household goods, merchandize, money, pictures, jewels, garments, in short, every thing not included in the former classes, that can be properly put in motion, and transferred from one place to another<sup>q</sup>.

4 Bl. Com.  
387, 389. Off.  
Ex. 57.

There are, also, some other interests, which fall under the description of personal chattels. Of this species is the testator's property in the public funds.

The

The next advowson, before it becomes void, I have already stated, is a chattel real, but, after an avoidance, it is a chattel personal.

112 Vin. Abr.  
173. Off. Ex.  
54, 73.

The executor also has an interest in the person of a debtor, in execution at the testator's suit, and without the executor's assent, the party cannot be discharged. This interest is in the nature of a personal chattel, inasmuch as the debtor is merely a pledge to secure the debt. So, a prisoner taken in war is of the same species in respect of his ransom, and, on the captor's death, shall go to his executor. Such, also, seems the interest in negro servants, purchased when captives of the nations with whom they are at war; though, accurately speaking, this property of the purchaser, (if it indeed continue,) consists rather in their personal service, than in their bodies, or persons; but such as it is, it vests equally in the executor.

3 Bac. Abr.  
57. Off. Ex.  
56.

Off. Ex. 56.

3 Bl. Com.  
403. Carth.  
396. Ld. Raym.  
147. Salk 667.

An executor has no interest in an apprentice bound to the testator. The contract is in its nature merely personal, and dies with the master. Yet, although an apprentice be not strictly transferable, if, with the consent of all parties, and of his own, he continue with the executor, it is a continuation of the apprenticeship; provided, in the case of a trade, it be of the same species.

5 Stra 1115.  
1266 Dougl.  
70 sed vid.  
Off. Ex. 53.

2 Vid stat. 5  
Eliz. c. 4. 1 Bl.  
Com. 427, 428.

7 Stat. 8 Ann.  
c. 10. 15 Geo. 3.  
c. 53. 8 Geo. 2.  
c. 13. 7 Geo. 3.  
c. 38. 17 Geo.  
3. c. 57.

An interest in the testator's literary property may devolve on the executor, pursuant to several statutes. An interest may, likewise, vest in his



by virtue of a patent granted to his testator, for the invention of a new manufacture within the realm.

7 Stat. 22  
Jac. 1. c. 3.

It seems, also, that a carroome, or a licence by the mayor of London to keep a cart, is a chattel interest, and belongs to the executor.

2 11 Vin. Abr.  
251. Com. Dig.  
Bians. B.  
2 Vern. 82.

The interest in all these chattels is, at the instant of the testator's death, vested in the executor, and from the death of the intestate, by relation, in the administrator, whether he has reduced them into his actual possession, or not, and, however widely dispersed, or remotely situated, they are regarded, in law, as assets in his hands. Therefore, where the jury found assets in Ireland, the stating of them on the special verdict to be in Ireland, was holden surplusage. So, if an executor live in London, and have left goods in Bristol, he hath such an immediate possession of the goods, that he may maintain trover for them in his own name. In like manner he shall be deemed to be in possession of a ship at sea. In short, in whatever part of the world the testator hath left effects, the executor, whether in the manual occupation of them, or not, is deemed, to all intents and purposes, their possessor in point of law. And, even, if goods be, in fact, taken out of his possession, after he has administered, legally he is not divested of them; they are still esteemed assets in his hands.

a Off. Ex. 108.  
109. 3 Bac.  
Abr. 57. Roll.  
Abr. 921.  
b 6 Co. 46. b.  
21 Vin. Abr.  
230  
c 3 Bac. Abr. 58.  
in not. 6 Mod.  
182. R. in evi-  
dence by Holt  
C. J. Ballard et  
Ux admx.  
v. Spencer, 2  
Term Rep.  
358. 4 Term  
Rep. 563. sed  
vid. Cockerill  
et Ux. extx. v.  
Kynaston,  
4 Term Rep.  
277.  
d 3 Bac. Abr.  
57. 11 Vin.  
Abr. 230. 240.  
e Off. Ex. 113.  
Off. Ex. Suppl.  
56. 5 Co. 35. b.  
11 Vin. Abr.  
230.

But



f 3 Bac. Abr.  
58. Salk. 79.

g 3 Bac. Abr.  
58. Salk. 79.

But, to give the executor a title, or to constitute assets, the absolute property of such chattels must have been vested in the testator, and, therefore, if A. take a bond in trust for B. and die, it shall form no part of the assets of A. So, if the obligee assign a bond, and covenant not to revoke the assignment, the bond shall not be included among his assets.

h 3 Bl. Com.  
395, 396. 3  
Bac. Abr. 58.

i Com. Dig.  
Admon. B. 10.  
Per two Just.  
Holt, C. J.  
constr. 1 Salk.  
295. 8 C. 3.  
Salk. 161. 8 C.  
Carth. 103.  
S. C. Skin. 274.  
S. C. 3 Mbd.  
276.

k 3 Bac. Abr.  
58. Cro. Eliz.  
405.

l 3 Bac. Abr.  
65. Off. Ex. 63.  
m 3 Bl. Com.  
429.

Nor shall goods, bailed or delivered for a particular purpose, as, to a carrier to convey to London, or to an inn-keeper to secure in his inn, be assets in the hands of their respective executors. Nor shall goods pledged or pawned in the hands of the executor of the pawnee, nor goods distrained for rent, or other lawful cause, be considered as the assets of the party distraining. Nor, if the testator were outlawed at the time of his death, shall his effects be so considered.

If A. consent to a disposition of the goods of the intestate, and afterwards take out administration, he shall be bound by the antecedent gift; but, if the executor make a fraudulent gift of them, they shall continue assets.

Such deeds and writings as relate to terms for years, or other chattels, belong to the executor.

Also, the property in the coffin, shroud, and other apparel of the dead body, remains in the executor.

Chattels personal, in the hands of an executor, may, in certain cases, be changed into chattels real, and so *vice versa*; as, if a debt be due to J. S. as executor, on statute, recognizance, or judgment, and he sue out execution, and take the lands of the debtor in extent, the personal duty is, in that case, converted into a chattel real: On the other hand, if such estate by extent, or a mortgaged term, devolve on an executor, and the debtor, or mortgagor pay the money due, such chattels real are turned into chattels personal \*.

\* Off. Ex. 75.  
3 Bl. Com. 430.

## CHAP. III.

OF THE INTEREST OF THE EXECUTOR OR ADMINISTRATOR, IN SUCH OF THE CHATTELS AS WERE NOT IN THE DECEASED'S POSSESSION AT THE TIME OF HIS DEATH.

## SECT. I.

*Of his interest in choses in action.*

**I** PROCEED now to treat of such of the testator's effects as were not in his possession at the time of his death; and in this class I am first to consider *choses*, or things in action, as well those where the cause of action accrued in the testator's life-time, as those where it accrued after his death.

In regard to the first, the executor is entitled to the testator's debts of every description, either debts of record, as judgments, statutes, and recognizances; or debts due on special contracts, as for rent; or on bonds, covenants, and the like, under seal; or debts on simple contracts, as notes unsealed, and promises not in writing, either express or implied; and all such debts, when received by the executor, shall be assets in his hands<sup>a</sup>.

<sup>a</sup> Off. Ex. 63.  
<sup>3</sup> Bac. Abr. 39.  
 Com. Dig.  
 Admon. B. 13.

An executor is also entitled, pursuant to stat<sup>4</sup> *Ed. 3. c. 7.* to a compensation in damages for trespass



trespass committed on the testator's goods in his life-time; and by the equity of that statute, for a conversion of the same; or for trespass with cattle in his close<sup>a</sup>; or for cutting his growing corn, which is a chattel, and carrying it away at the same time<sup>b</sup>; and by the same liberal construction of the abovementioned statute, the executor is also entitled to a debt accrued to the testator, under the stat. of 2 & 3 Ed. 6. c. 13. for not setting out tithes<sup>c</sup>; to a *quare impedit*, for a disturbance of his patronage<sup>d</sup>; to ejectment, for ejecting him<sup>e</sup>; and, in short, to every other injury done to his personal estate previously to his death.

<sup>a</sup> 3 Bac. Abr. 59.  
Com Dig.  
Admon. B. 12.  
Off. Ex. 70.  
Lat. 168.

<sup>b</sup> 1 Vent. 187.

<sup>c</sup> 1 Sid. 38. 407.  
1 Vent. 30.  
Poph. 129.

<sup>d</sup> Off. Ex. 66, 67.  
<sup>e</sup> Poph. 129.

An executor shall also have damages for the breach of a covenant to do a personal thing<sup>f</sup>; and although the covenant sound in the reality, as for not assuring lands, yet if it be broken in the testator's life-time, the executor shall be entitled to damages<sup>g</sup>; and the damages in any of these cases, when recovered, shall be regarded as assets.

<sup>f</sup> Lat. 168.  
<sup>g</sup> 3 Bac. Abr. 59.

<sup>g</sup> Com. Dig.  
Admon. B. 12.  
Com. Dig. Co-  
venant, B. 7.  
1 Vent. 176.

So the executor of the assignee of a bail-bond shall recover on that instrument, inasmuch as it is a vested interest<sup>h</sup>.

347 2 Lev. 26.  
Off. Ex. 65.

<sup>h</sup> Com. Dig.  
Admon. B. 12.  
Forfeif. 367.

So an executor is entitled to damages against a sheriff for permitting a party in execution on a judgment recovered by the testator to escape; even although the escape happened in the testator's life-time<sup>i</sup>. An executor may also demand damages of a sheriff for not returning his writ, and paying money

<sup>i</sup> Com. Dig.  
Admon. B. 12.  
Cro. Car. 297.  
Mod. Ca. 126

1 Com. Dig.  
Admon. B. 13.  
Cro. Car. 297.

1 Salk. 12.

m 3 Bac. Abr.  
60. Off. Ex. 71.  
1 Sid. 81.  
Off. Ex. 65.

o Com. Dig.  
Admon. B. 13.  
Stra. 212.

p Lat. 168, 169.  
1 And. 243.  
Jou. 174.  
1 Vent. 187.  
Off. Ex. 68.

r 3 Bac. Abr. 59.  
Moore 858.  
a Chan. Ca. 152.  
Brownl. 76.

money levied on a *fieri facias*<sup>k</sup>; or for a false return, stating that he had not levied the whole debt, when in fact he had<sup>l</sup>. So, if the testator in his life-time were entitled to a writ of error, or *audita querela*, or to the antiquated remedies of attain, *disceit*, or *identitate nominis*, the executor has a right to recover such compensation as the testator might have claimed; and whatever he so recovers, shall be assets in his hands<sup>m</sup>. So, an executor is entitled to replevy goods of the testator<sup>n</sup>; or to recover damages of an officer for removing goods taken in execution before the testator, who was the landlord, had been paid a year's rent<sup>o</sup>. And, in general, an executor has a right to a compensation, whenever the testator's personal estate has been damaged, and the wrong remains unredressed at the time of his death.

But an executor has no right to an action for an injury done to the person of the testator<sup>p</sup>, nor for a prejudice to his freehold; as for felling trees, or cutting the grass, for the trees, and grass are parcel of the same<sup>q</sup>.

An executor shall also have the benefit of any equitable title of the testator in respect to personal property; and money recovered by the executor by decree in a court of equity, shall be assets<sup>r</sup>.

In all the above-mentioned cases, I suppose the cause of action to have accrued before the death of the testator. But where it accrues after that event,

the

the executor is equally entitled to the debt, or damages.

Therefore, if A. contract to deliver certain goods to B. on a certain day, and they are not delivered in the life-time of B. but after his death to his executor, he shall be possessed of them in that character, and they shall be assets in his hands; as in case the contract had not been performed, damages recovered for the non-performance would have been so considered. So if A. covenant with B. to grant him a lease of certain land by a certain day, and B. die before the day, and before the grant of the lease, A. is bound to grant it to the executor of B. and it shall be vested in him as executor, and consequently be assets. Or, if A. refuse to grant the lease, he is liable to make a compensation to the executor of B. in damages, which shall also be assets. Off. Ex. 82.  
II Vin. Abr.  
231. L. of. Ni.  
Pr. 158.  
u Plowd. 286.

So also a bail-bond may be assigned to a deceased plaintiff's executor, and he shall be equally entitled to recover upon it, as if it had been assigned to the testator in his life-time. w Fortesc. 370.

So, if a defendant in execution at the testator's suit escape after the testator's death, the executor shall recover damages for the escape, and the damages so recovered shall be assets. So an executor is entitled to replevy goods taken after the death of the testator. So, if A die possessed of a term for years in an advowson, such term shall vest x Com. Dig.  
Admon. B. 13.  
Godb. 262.  
Vid. 1 Roll.  
Rep. 276.  
y Off. Ex. 36.



vest in his executors; and in case of their being disturbed, they shall recover damages in a *quære impedit*, and such damages shall be assets <sup>a</sup>.

<sup>a</sup> Com. Dig.  
Assets C.  
Roll. Abr. 920.  
Moore 848.

So, if an executor has an equitable title to property in that character, and he institutes a suit for the same, and it be decreed to him in a court of equity, it shall also be assets <sup>b</sup>.

<sup>b</sup> 11 Vin. Abr.  
239, 240.  
3 Bac. Abr. 60.  
1 Salk. 207.

Where the cause of action accrued before the testator's death, neither debts nor damages shall be assets, till they are actually recovered by judgment, and levied by execution, or otherwise reduced into possession <sup>c</sup>.

<sup>c</sup> 11 Vin. Abr.  
240. 1 Salk. 207.

So, the balance of an account stated with the executor subsequent to the testator's death shall not be assets, unless he has recovered the same, and has it actually in his hands, for the promise to the executor, on the account stated, creates no new cause of action, but ascertains merely the old cause of action which existed in the testator's life time <sup>d</sup>. But such debts or damages recovered may be assets, although never, in point of fact, received, as, if they be released by the executor. For the release, in contemplation of law, shall amount to a receipt <sup>e</sup>.

<sup>d</sup> 3 Bac. Abr. 60.  
Hob. 66. Cro.  
Minn. 43.

Where the cause of action accrues after the testator's death, the debt or damages shall be assets immediately. As where money was had and received by the defendant, to the use of the plaintiff



as executor, it was held, that if the defendant received the money by the consent or appointment of the plaintiff, it was affets in his hands immediately; if without his consent, yet the bringing of the action was such a consent, as that on judgment obtained it should be affets immediately without execution<sup>a</sup>.

<sup>a</sup> 2 Salk. 207.

If a covenant affect the realty, and the breach be subsequent to the testator's death, the heir, and not the executor, as is hereafter shewn, shall be entitled to the damages.

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## S E C T. II.

*Of interests vested in him by condition, by remainder, or increase, by assignment, by limitation, and by election.*

AN executor may become entitled in such character to chattels real or personal, by condition. As, if a lease for years, or other chattel, has been granted by the testator to A. on condition, that if A. do not pay a certain sum of money, or perform some other specific act within a limited time, the grant shall be void, and the condition is not performed, such chattel shall result to the executor, and be affets<sup>a</sup>. So, where the condition is, that the testator or his executors shall pay a sum of money

<sup>a</sup> OE. Ex. 76.

money to avoid the grant, and the executor shall pay it accordingly. As if A. mortgage a lease, or pledge a jewel, or piece of plate, and before the day limited for redemption or payment die, his executor is entitled to redeem at the day and place appointed<sup>b</sup>. If he redeem with the testator's money, such chattels shall be assets<sup>c</sup>. If he redeem with his own money, he shall be indemnified in respect to the sum he has disbursed out of the effects of the testator, or, if necessary, by the sale of the chattel itself, and in that case, the surplus over, and above such indemnity shall be assets<sup>d</sup>. In case he have no fund as executor, and he advance the money out of his own purse for the redemption, and it be fully equivalent to the value of the chattel, the property is altered by such payment, and shall be vested in the executor as a purchaser in his own right<sup>e</sup>. But if the executor disbursed his own money to redeem, after the time specified for redemption is elapsed, then it is said that the chattel, without any distinction, in respect of its value, shall at law belong to the executor in his own right; since in such case it must be deemed to be sold to him by the mortgagee, or pawnee, who, after the forfeiture is incurred, has a legal right to dispose of it at his pleasure to him, or to any other person. But in equity, the excess in the value of the thing beyond the money paid for the redemption shall be regarded as assets in the hands of the executor<sup>f</sup>.

<sup>b</sup> Off. Ex. 76, 77.

<sup>c</sup> Off. Ex. 81.

<sup>d</sup> 3 Bac. Abr. 58, 59. in not. Off. Ex. 79. 2 Fenbl. 404. n. f.

<sup>e</sup> 3 Bac. Abr. 58. Keilw. 63.

<sup>f</sup> Off. Ex. 81.

Chattles which were never vested in the testator in possession, may accrue to an executor by remainder

mainder, or increase: As, if a lease be granted to A. for life, remainder to his executors for years, such remainder shall be assets in the hands of his executor, though it could never come into the possession of the testator. In like manner, where a lease for years is given by will to A. for life, and on his death to B., and B. dies before A.; although the term never were in B. yet it shall devolve on his executor, and be assets. So, a remainder in a term for years, though it never vested in the testator's possession, and though it continue a remainder, shall go to the executor, and shall be assets, for it bears a present value, and is capable of being sold <sup>a</sup>.

2 Off. Ex. 83.  
Vid. 2 Fonbl.  
371. not. (k.)

But where a lease was granted to A. for life, with a proviso, that if he died before the end of sixty years then next ensuing, that his executor should hold the premises as in his right for the term of so many years as should amount to the whole number of sixty, so that the commencement of the same should be computed from the date of the indenture: It was held, that a lease for years was not created by this proviso, either in A. or by remainder in his executor <sup>b</sup>.

h 11 Vin. Abr.  
157 Anderson  
19 pl. 38. Secd  
vid. Off. Ex.  
83.

So, the young of cattle, or the wool of sheep, produced after the testator's death, shall be assets <sup>c</sup>. So, if an executor of a lessee for years enter on the lands demised, the profits over and above the rent shall be so regarded <sup>d</sup>.

k Com. Dig.  
Assets C.  
1 Salk. 79. Vid.  
Off. Ex. 82, 85.

K

A trade



1 r Term Rep.  
295. Sed vid.  
Off. Ex. 83.

A trade is not transmissible to an executor, it is terminated by the death of the trader. If, therefore, executors carry on trade, they must do so at their own risque as individuals: but they may carry it on in their representative capacity under the direction of the court of chancery<sup>1</sup>.

An executor may also take under the description of an assignee.

Assignees are such persons as the party, who has a power of assignment, actually assigns to receive the chattel; as if A. contract to deliver a horse on a given day to B. or his assigns, then if B. appoint J. S. to receive the horse, J. S. is an assignee in deed<sup>m</sup>.

m Plowd. 288.

But an executor is an assignee in law, because by law he is the representative of the testator, and is entitled to all his goods and chattels, and the benefit of all personal contracts entered into with him; and therefore in the case just mentioned, if B. die before the day limited for the delivery of the horse, it ought to be delivered to his executor: for by law he is the assignee of B. for such a purpose<sup>n</sup>.

n Plowd. 288.

So, if a legacy is bequeathed to A. and his assigns, and A. die before payment, it shall go to his executor or administrator, as assignee<sup>o</sup>. So, if A. be bound to deliver a true rental to J. S. or his assignee at the end of twenty years, and he die before that time has elapsed, A. is bound to deliver

o 11 Vin. Abr.  
156.

tru



true rental to his executor, for he is assignee in point of law<sup>p</sup>. So, if A. be bound to abide by the award of two arbitrators, and they award that he shall pay to B. or his assigns, two hundred pounds before a day limited for that purpose, and B. die before the day, the money shall be paid to his executor as assignee<sup>a</sup>. Or if A. covenant to grant a lease to J. S. and his assigns, by Christmas, and J. S. die before that time, and before the grant of the lease, it must be made to his executors as his assigns<sup>r</sup>. So, if a lessor covenant to build a new house for the lessee and his assigns, the executor of the lessee shall have the benefit of the covenant as assignee<sup>r</sup>. But where a bond was conditioned for the obligor's paying twenty pounds to such person as the obligee should by his will appoint, and he nominated J. S. his executor, but made no other appointment, it was resolved that the executor should not have the twenty pounds, for he is only an assignee in law, and takes to the use of the testator, but that in that case the condition was in favour of an actual assignee who takes to his own use<sup>t</sup>.

<sup>p</sup> 11 Vin. Abr. 156. Hob. 10.

<sup>a</sup> 11 Vin. Abr. 157. 1 Leon. 316.

<sup>r</sup> 11 Vin. Abr. 158. Off. Ex. 101.

<sup>t</sup> 11 Vin. Abr. 158. Lat. 261.

<sup>t</sup> 11 Vin. Abr. 156. Hob. 9. Godb. 192. Harg. Co. Litt. 210. not. 1.

So, it has been held, that if A. be bound to pay ten pounds to the assignee of B. the obligee, B.'s executor shall not have the ten pounds. But that if A. be bound to pay ten pounds to B. or his assignee, then the executor of B. shall be entitled, because it was a right vested in the obligee himself<sup>a</sup>.

<sup>a</sup> 11 Vin. Abr. 161. Godb. 192.

<sup>a</sup> Vid. *supr.*  
106.

<sup>w</sup> 11 *Vin. Abr.*  
158 *Off. Ex.*  
101.

So, before the provisions of the statute of frauds in regard to estates *pur autre vie*<sup>a</sup>, if a lease were granted to A. and his assigns during the life of B. it could go only to A.'s assignee in deed, and not to his executors<sup>w</sup>. And, on his failure to appoint such assignee, it was, in case of his death, open to be appropriated by the first occupant that could enter upon it during the life of *cestui que vie*.

But where on a fine the use of land was limited to A. for eighty years, with a power to A. and his assigns to make leases for three lives, to commence after the expiration of the term: A. assigned over to B.; B. died, having made his will and appointed C. his executor: C. assigned over to D.; and D. in pursuance of the power, made a lease for life: The question was, whether D. was such an assignee of A. as to have a power to make this lease, or whether it should extend only to the immediate assignees of A.; a point the more doubtful, as there had been a descent on an executor. On its being objected, that an executor should not in some cases be said to be a special assignee, the court seemed inclined to the contrary; and that D. should be considered as an assignee for the purpose of making the leases in question, as well as any person that should come to the estate under the first lease, though there should be twenty mesne assignments; and on a subsequent day judgment was given accordingly<sup>x</sup>.

<sup>x</sup> *Margr. Co.*  
*Litt.* 210. not. 1.  
<sup>1</sup> *Freem.* 476.  
<sup>1</sup> *Vin. Abr.*  
158.

An executor may also be entitled in respect of limitation; as, where the testator devised the bene-

ficial

ficial interest of a lease for twenty-one years to B. his wife, and executrix, for six years, with a proviso, that if C. his son, who was then abroad, should come home within that period of time, he should have the residue of the term, but that if he should fail to do so, then that D. another of his sons, should have it until the arrival of C. B. the wife entered, D. died within the six years, at the expiration of which C. was not returned. It was held, that this was not a mere possibility in deed, but was coupled with an interest in the term after the six years elapsed, and was therefore transmissible to D.'s executor. So, it is held by some authorities, that where a term is devised to A. and the heirs male of his body, and if he die without issue male to J. S. and J. S. die in the life-time of the first devisee, yet that his possibility of having the term under such devise shall belong to his executor. But by other authorities it has been adjudged, that the executor of J. S. cannot enter, because he had only a possibility and no interest, and that this case is distinguishable from that above stated, inasmuch as in this case the whole term was vested in the first devisee, whereas in that case only a part of it was so vested.

y 11 Vin. Abr.  
159. Cro. Jac.  
509.

2 11 Vin. Abr.  
159. Off. Ex.  
246.

a 11 Vin. Abr.  
159. in not.  
Moore 831.  
4 Leon. 246.

b 11 Vin. Abr.  
160. Carth. 52.  
Com. Dig.  
Chan. 3. V. 8.  
Chan R. 112.  
2 Ventr. 349.  
366. 2 Vera,  
199.

If a legacy out of the personal estate is bequeathed to A. to be paid *when* he is of the age of twenty-one years, and he dies before that time, his executors are entitled to the legacy, immediately, if it be payable with interest; if not, when A. would have come of age. But if such legacy

gacy



c Com. Dig.  
Chancery 3. Y.  
8. 2 Ventr.  
342. Com. Rep.  
2d Ed. 719.

d 2 P. Wms.  
612 Mr. Cox's  
not. 1. 2 Chom.  
Ca. 155. 2 Salk.  
415. 1 Eq. Ca.  
Abr. 295.

1 Vern. 255.  
Prec. Chan. 318.

3 Bro. P. C. 337.  
2 Eq. Ca. Abr.

548. Barnard.  
320 3 Atk. 427.

1 Burr. 227.  
1 Bro. Ch. Rep.

181, 298. 2 Bro.  
Ch. Rep. 75.

3 Bro. Ch. Rep.  
475.

e 2 P. Wms. 612.  
not. 1. 1 Vern.

462. 2 Vern.  
673. Prec. Ch.

318. 1 Atk.  
501, 512. Bar-

nard, 43. 3 Atk.  
645. 1 Vef. 118.

2 Bro. Ch. Rep.  
309.

f 2 P. Wms.  
612. not. 1.

2 Vef. 207, 262.  
1 Bur. 227.

g 2 P. Wms.  
612. not. 1.

2 Ch. Ca. 165.  
1 Vern. 204.

321. 2 Vern.  
92, 416. Prec.

Ch. 267, 290.  
318. 2 P. Wms.

276. Mofc. 68.  
9 Mod. 106.

3 P. Wms. 134.  
Ca. Temp.

Talb. 193.  
1 Atk. 482, 502.

512, 555.  
3 Atk. 69, 112.

1 Bro. Ch. Rep.  
106. in not. 124.

in not. 2 Bro.  
Ch. Rep. 108.

gacy be bequeathed to A. at his age of twenty-one  
merely, or if he shall attain the age of twenty-one,  
and he die before that period, his executors have  
no title.

This distinction with respect to interests arising  
out of personal property, as far at least as they are  
of a *legatory* nature, although it be explained, and  
in some degree corrected by the more modern  
cases, is in substance established by a series of au-  
thorities; but although the legacy out of the  
personal property be left to A. at twenty-one, yet  
if interest is given before the time of payment,  
that circumstance is held to be evidence of an in-  
tention to vest the legacy. But such presump-  
tion does not appear to be formed from that cir-  
cumstance in respect to any interests but those of  
a legatory nature, although the fund be merely  
personal: for it hath not been admitted in cases of  
portions for younger children, to be raised out of  
such fund at twenty-one, with interest in the mean  
time for maintenance and education.

So with respect to all interests arising out of  
land, the rules on the subject are totally different;  
for whether the land be the primary, or auxiliary  
fund, whether the charge be made by deed, or will,  
as a portion, or a general legacy for a child or a  
stranger, with or without interest, the general rule  
is, that charges on land, payable on a future day,  
shall not be raised where the party dies before the  
day of payment. This rule however is subject to  
many



many exceptions; as, where the time of payment is postponed from the circumstances, not of the person, but of the fund. As, where a term was created for daughters' portions, commencing after the death of father and mother, on trust to raise the portions from and after the commencement of the term, and the father died, leaving a daughter, the portion was decreed to be vested, but not raisable during the life of the mother<sup>h</sup>.

In respect to those cases where portions have been given out of land, and no time of payment expressed, it seems difficult to reconcile the determinations. According to one class, their interest is vested immediately, and transmissible; according to another, such portions shall not vest, if the children die before they want them<sup>i</sup>.

But if lands be devised for payment of portions, and one of the children entitled to a portion die after it is become due, though before the lands are sold, the personal representative of such child will clearly be entitled to the money<sup>k</sup>.

An executor may also claim by election; as where the testator at the time of his death was entitled out of several chattels to take his choice of one or more to his own use. If nothing passes to the grantee of a chattel before his election, it ought to be made in his life-time<sup>l</sup>. As if A. give to B. such of his horses as B. and C. shall choose, the election ought to be made in the lifetime of B.<sup>m</sup>

But

<sup>h</sup> 2 P. Wms. 612. not. 1.  
<sup>i</sup> 2 Atk. 127, 130.  
<sup>j</sup> 507. Barnard.  
<sup>k</sup> 327. 1 P. Wms. 457. 2 P. Wms. 513. Ca. Temp. Talb. 117. 3 P. Wms. 414.  
<sup>l</sup> 3 Atk. 319.  
<sup>m</sup> Com. Rep. 716.  
<sup>n</sup> 1 Vef. 44. 2 Bro. Ch. Rep. 119.  
<sup>o</sup> 124. in not.  
<sup>p</sup> Ambli. 167, 230.  
<sup>q</sup> 266, 575. 1 Bro. Ch. Rep. 120.  
<sup>r</sup> in not. 191. & in not. 193. in not.  
<sup>s</sup> 1 3 P. Wms. 119.  
<sup>t</sup> 172. 2 P. Wms. 612. not. 1.  
<sup>u</sup> Prec. Ch. 195.  
<sup>v</sup> 213. 2 Vef. 309.  
<sup>w</sup> 1 Bro. Ch. Rep. 124. in not.  
<sup>x</sup> 395. and vid.  
<sup>y</sup> 2 Atk. 133. vid. also 11 Vin. Abr. 163, 164.  
<sup>z</sup> 1 Vern. 326.  
<sup>aa</sup> 347. 2 Vern. 35.  
<sup>ab</sup> 72.  
<sup>ac</sup> k 11 Vin. Abr. 163. 1 Vern. 276.  
<sup>ad</sup> 1 Com. Dig. Election B. Hargr. Co. Litt. 245.  
<sup>ae</sup> m 1 Roll. Abr. 726.

n Hargr. Co.  
Litt. 145.

a Roll. Abr.  
725.

p Hargr. Co.  
Litt. 144. b.

But where an interest vests immediately by the grant, the election may be made by the executor as well as by the party himself". As, if a fine be levied of a hundred acres, and the conusee grant fifty to the conusor for a term of years, his executor may choose which fifty he will have. So, if A. gives one of his horses to B. and C., B. may elect after the death of C. which he will take, for an interest vested in them immediately by the gift". So, if the election determine only the manner or degree, in which the thing shall be taken, the executor, as well as the grantee himself, may make it; for in such case, also, there is an immediate interest". As, if a lease be granted to A. for ten, or twenty years, as he shall elect, the executor is entitled to the election.

## C H A P. IV.

OF CHATTEL INTERESTS WHICH DO NOT VEST IN  
THE EXECUTOR, OR ADMINISTRATOR

## S E C T. I.

*Of chattels real which go to the heir.*

PROCEED now to enquire under what special circumstances chattel interests shall go to the heir of the last proprietor.

The principle, which generally pervades the cases, in which the heir, as distinguished from the executor, shall be entitled to chattels, is this: that they are so annexed to, and consolidated with, the inheritance, that they shall accompany it wherever it vests<sup>a</sup>.

<sup>a</sup> 2 Bl' Com.  
427, 428.

And, first, in regard to chattels real: If A. is seised in fee, grant an estate tail, or a lease for years, reserving rent, such rent as accrues after his death, being incident to the reversion, shall go to his heir, and not to his executors<sup>b</sup>, though they are expressly named in the conveyance. If A. seised in fee, make a lease, reserving rent to him, his executors and assigns, and the rent is determined, for the executors are

<sup>b</sup> 3 Bac. Abr.  
62. Hargr. Co.  
Litt. 47.

<sup>c</sup> Hargr. Co.  
Litt 47. not. 9.  
Cro. Car. 207.

not



d Hargr. Co.  
Litt 47. 2  
Roll. Abr. 436.  
1 Ventr. 161.

e See Noy 96.  
12 Co. 36. Cro.  
Eliz. 217. 3  
Bac. Abr. 63.  
in not.

f Hargr. Co.  
Litt 47. not. 8.  
ibid. 202. 3  
Bac. Abr. 62.  
2 Saund 367.  
1 Ventr. 148.  
161. Raym.  
213. 2 Lev. 13.

g 3 Bac. Abr.  
63. 10 Co. 127.

h 1 Pac. Abr.  
63. Hargr. Co.  
Litt. 202. not.  
1. 1 Saund.  
287. Salk. 578.

i 11 Vin. Abr.  
168. Cro. Jac.  
282. Vid. 2 Bl.  
Comm. 259.

not entitled to it, inasmuch as they are strangers to the reversion, which is an inheritance, nor shall it go to the heir because he is not named<sup>d</sup>. But, if A. seised in fee, make a lease for years, reserving rent to him, and his assigns, or to him, his executors and assigns, during the term, although there be decisions to the contrary<sup>e</sup>, the words "during the term," shall be sufficient to carry the rent to the heir. Where the rent is so reserved, the intention of the parties is clearly expressed that the lessee is to pay the same during the continuance of the demise<sup>f</sup>.

In case the lease reserve rent at Michaelmas, ten days after; if the rent be not paid at Michaelmas, and before the ten days are expired, the lessor dies, his heir, and not his executor, shall receive the rent; for, although it were in the election of the lessee to pay it at Michaelmas, yet the ten days after are the true legal term, and, consequently, the rent was not legally due before the period of time, and therefore is no chattel<sup>g</sup>. So, if the lessor die on the day on which the rent is payable, after sun-set, and before midnight, the heir, and not the executor, may demand the rent for it is not, in strictness, due till the last minute of the natural day, although it may be more convenient to pay it before<sup>h</sup>. So, where rent is granted to A. and his heirs, for life, and the life of B. and C. the heir shall have the rent as a person specially nominated, and as heir by descent<sup>i</sup>. So, although, for the arrears of a *nomine panis*, the grant

gran

grantee himself, and, therefore, his executors, k 11 Vin. Abr.  
 may have an action of debt, yet the *nomine pene*, 168. Hargr.  
 is an incident to the rent, shall descend to the 11 Vin. Abr.  
 heir. So, a term for years, in trust to pay 173. 2 Vern.  
 debts, and afterwards to attend the inheritance, 645. Com.  
 shall go to the heir, and not to the executor. Dig. Biens. B.  
 So, if a term be raised for a certain purpose, and 2 Ca. Ch. 156,  
 that purpose be answered, the heir shall have the 160.  
 beneficial interest in the same, whether it be so m 11 Vin. Abr.  
 expressed or not; but he shall take it as a term, 169. 2 Vent.  
 and, consequently, as a chattel. So, an annuity, 359.  
 although a chattel interest, is descendible to the n 11 Vin. Abr.  
 heir. 171. 2 Vern.  
 139.  
 o 11 Vin. Abr.  
 153. Arg. 30  
 Mod. 337.  
 Vide also 11  
 Vin. Abr. 146.  
 pl. 25. & Co.  
 Litt. 374. b.

But, if a debt be owing to A. and, in satisfac-  
 tion of it, the debtor grants him an annuity,  
 charged on lands for his own life, and redeemable,  
 such annuity shall be part of A.'s personal estate, p Com. Dig.  
 But a term conveyed, as a fee, by lease and re- Biens. C.  
 lease, to J. S. and his heirs, by the word "grant," 1 Vef. 402.  
 although it cannot operate as a fee to vest in the  
 heirs of J. S. yet shall go to his personal represen-  
 tative. So, if a lessee for twenty years, make a q 11 Vin. Abr.  
 lease for ten years, reserving a rent during the last 153. Chanc.  
 mentioned term, to him and his heirs, it shall be Prec. 480.  
 void as to his heir, and shall belong to his execu-  
 tors. So, if A. possessed of a term for years, r 1 Vent. 161.  
 devise it to B. for life, remainder to the heirs of  
 A., it seems that, on B.'s death, it shall go to  
 his executor, and not to his heir. So, if A. 11 Vin. Abr.  
 devised in fee, make a lease for years, reserving 155. 3 P. Wms.  
 rent, and devise the rent to B., B.'s executor, and 29.

not his heir, shall be entitled to the rent, because B. had no more than a chattel interest<sup>1</sup>. So, where a copyhold estate was granted to A. for the lives of A. B. & C., and A. died intestate, it was held that his administrator should have the estate during the lives of B. & C.<sup>2</sup>

111 Vin. Abr.  
145. Dyer 3. b.  
not. 1. ibid.  
Cro. Eliz. 637.  
651. Moore  
549.

111 Vin. Abr.  
151. in not.  
1 Vern. 415.

So, a lease granted by a copyhold for one year only, shall be no forfeiture, for it is warranted by the general custom of the realm, and shall be accounted assets in the hands of the executor of the lessee<sup>3</sup>.

111 Vin. Abr.  
146. Poph. 188.  
Hargr. Co.  
Litt. 59. not. 4.  
4 Co. 26. 9 Co.  
75. b. W. Jo.  
249. Litt. Rep.  
233.

If A grant a rent in fee to J. S. with a proviso that if it be in arrear, the grantee may enter the lands, and retain, till he be satisfied; the power of entry is an inheritance, and descends to the heir; but when entry is made, the party has merely a chattel interest in the lands, which, with the arrears, shall go to his executor<sup>4</sup>.

111 Vin. Abr.  
147. 1 Lev 171.  
Raym. 135.  
158. 1 Sid. 223,  
262, 344.

If the grantee of a rent in fee take a lease for years of the lands out of which the rent issues, and die, his executor shall have the land, and the heir is precluded from the rent<sup>5</sup>.

111 Vin. Abr.  
147. Litt. Rep.  
59.

So, a bond given by one parcener to pay the other, her executors or administrators, an annual sum during the life of J. S. for owelty of partition, or as a compensation for her share's being of the less value, shall go to the executor and not to the heir. Because, in such case there is no grant of a rent<sup>6</sup>.



but a mere contract, and therefore the obligor had in her election, either to pay the same, or to forfeit her bond". And where articles of agreement were executed for the purchase of land, and six hundred pounds paid, but interest paid for the money by the vendor, and rent for the premises by the vendee: it was held, that on the latter's dying before the conveyance, his executor was entitled to the six hundred pounds, as part of his personal estate.

u 11 Vin. Abr.  
150. 4 Vern.  
133.

w 11 Vin. Abr.  
149. 2 Chan.  
Rep. 138.

On the other hand, where A. died intestate, leaving two daughters, and after his decease four hundred pounds were found hidden; which the widow paid out in land, and settled it to herself for life, remainder to her two daughters in tail, remainder to her own right heirs: The administrators of the daughters claimed from the heir at law of the widow two thirds as personal estate, and witnesses proved, that the same four hundred pounds were applied in the purchase: although the Master of the Rolls decreed for the administrators; yet on appeal the Lord Keeper reversed the decree on the ground, that money had no ear-mark, and could not be followed when invested in a purchase<sup>2</sup>. But where an executor in trust for an infant of a lease for ninety-

2 11 Vin. Abr.  
153. 2 Vern.  
440.

nine years determinable on three lives, on the lord's refusal to renew but for lives absolutely, complied with his requisition, and changed the years into lives; on the infant's dying under twenty-one, this was held to be a trust for his administrator, and not for his heir<sup>3</sup>. So where

3 11 Vin. Abr.  
155. 3 P. Wms.  
99.

trustees

2 11 Vin. Abr.  
151. 2 Chan.  
Rep. 377.

trustees purchased lands in fee simple with the infant's money, and the infant died in his minority, it was held that the land should be accounted part of the personal estate, and should go to his administrator<sup>a</sup>. So, where committees of a lunatic invested part of his personal estate in the purchase of lands in fee, the court declared it should be deemed personal property, decreed an account, the land to be sold, and the money to be divided among the next of kin. For it shall not be in the power of a guardian or trustee to change the nature of the estate. But it appears, that if in such case the trustees obtain a decree in equity for the purchase, the court will maintain its decree, and then the estate shall go to the heir, and not return to the personal fund, if there be no ground to impeach the trustees of fraud<sup>a</sup>.

2 11 Vin. Abr.  
151. 2 Vern.  
192. 2 Freem.  
209. 1 Vern.  
435.

With respect to mortgages, inasmuch as courts of equity consider such contracts as merely personal, the mortgage money is in general held to be part of the personal estate, and to belong to the executor of the mortgagee. But, under special circumstances, it shall be regarded in the light of real property, and shall go to the heir<sup>b</sup>.

b Powell on  
Mortgages,  
2d vol. 682—  
698.

At law, if the condition or defeazance of a mortgage of inheritance make no mention either of heirs, or executors, to whom the money shall be paid, in that case the money ought to go to the executors, inasmuch as it was originally derived out of the personal estate, and therefore in nature

justi

Justice ought to return thither. If the defeazance appoint the money to be paid either to the heir, or executors, and the mortgagor pay the money at or before the day, he may elect to pay it either to the heir, or the executor. If the day of payment be past, and the mortgage forfeited, all election is gone; for at law there is no redemption. There can be a redemption only in equity, and equity will not revive the election; but considers the case the same as if neither heir nor executor had been named. And as in that case the law will give it to the executor; equity, which ought to follow the law, will decree it to the same person. Hence, therefore, when the security descends to the heir of the mortgagee attended with an equity of redemption, as soon as the mortgagor pays the money the land shall belong to him, and the money only to the mortgagee, which is merely personal, and so accrues to his executor. Nor will it appear hard, that the heir should be decreed to make a reconveyance without having the money which comes in lieu of the land, if it be considered, that the land was no more than a security, and that after payment of the money a trust exists for the mortgagor, which the heir of the mortgagee is bound to execute.

Nor is it material that the executor of the mortgagee has assets without such money. Assets shall not be the measure of justice between the parties. The heir either ought to have the money if there were no assets; or ought not to have it although there



c 11 Vin. Abr.  
148. and in not.  
2 Freem. 143.

d 1 Ventr. 351.  
Barnard. 50.

e Off. Ex.  
Suppl. 47.  
Hargr. Co.  
Litt. 210.

f 2 Ventr. 348.

there were. Nor is the principle varied by there being no personal covenant on the part of the mortgagor to pay the money: For although the claim of the mortgagee's executor would be strengthened by such a covenant, yet it shall avail him without it<sup>c</sup>. And although a mortgage in fee be conditioned, that the mortgagor shall pay the money to the mortgagee, his heirs, executors, administrators, or assigns, and the mortgagee dies before the forfeiture of the mortgage, whereby the mortgagor has his election at law to pay the money to either, yet in equity it shall belong to the executor; for in mortgages in fee, the mortgagee and his heirs are trustees for his personal representatives. In short, mortgages are deemed in equity to be mere chattel interests, and to belong to the executor of the mortgagee, unless his intention to the contrary be declared in express terms by the contract<sup>e</sup>, or by his will, or be evidently implied by his conduct. As, if he foreclose, or procure a lease of the equity of redemption, and obtain actual possession of the premises. So where a mortgage in fee descended on the heir at law of the mortgagee ten years after the money had been paid to the heir, filed a bill for the same, it was decreed against him, but without interest<sup>f</sup>.

Nor shall a specific legacy to the executor of him of money due on mortgage; as, where a mortgagee in fee, after bequeathing several legacies, gave one hundred pounds to his executor, expressed

directed

directing, that his legacy should not be paid till debts and other expences were discharged, yet the court decreed in his favour against the heir<sup>a</sup>. So, <sup>2</sup> Ca. Ch. 187. <sup>1</sup> Vern. 411. if the mortgagor shall fail to redeem, the heir of the mortgagee shall convey the land to the executor. As, where the mortgage was forfeited, though the heir of the mortgagee were in possession by descent, and there were no deficiency of assets, on the mortgagor's not offering to redeem, the heir of the mortgagee was decreed to make such conveyance: for since the money, as part of the personal estate, would have gone to the executor, he is entitled to the land as a recompence<sup>b</sup>. So, where a copyhold was mortgaged by surrender to A, who was admitted tenant, and died, leaving B, his son, and heir, and executor: B. entered, and was also admitted, and afterwards by his will, but without any surrender to the use of the same, devised it to C. who, on B.'s death, became the personal representative of A. and exhibited his bill against D. who was heir at law of A. and B. and who claimed this as a real estate; the forfeiture having been so long incurred, two descents having been cast, more being due on the estate than its value, the mortgagor having by his answer refused to redeem, and submitted to be foreclosed, and the devise by B. to the plaintiff being void at law for want of a surrender to the use of the will: it was decreed to C. as the personal representative of A. inasmuch as there was no foreclosure, nor release of the equity of redemption in the life-time of the mortgagee, and, on appeal, the decree was affirmed<sup>c</sup>.

<sup>h</sup> 2 Chan. Ca. 30, 187.

<sup>1</sup> 2 Vern. 367.  
<sup>1</sup> Eq. Ca. Abr.

If 273, 328, vid.  
<sup>2</sup> Vern. 193.

If on a mortgage being forfeited, the mortgagor releases to the heir of the mortgagee in fee, yet the executor of the mortgagee shall have the benefit of the estate, although there be no debts. So, in the case of foreclosure of a mortgage, or that the mortgage be of so ancient a date, as in the ordinary course of the court it is not redeemable, it shall belong to the personal representative of the mortgagee: for unless the mortgagee were actually in possession, it shall be considered as personal estate<sup>k</sup>. So, where a wife had a mortgage in fee of a copyhold, and died leaving issue, and the issue was admitted, and died, and then the husband, as administrator to his wife, claimed the copyhold as a mortgage, and consequently part of his wife's personal estate; it was decreed to him against the heir at law, although the latter had been admitted<sup>l</sup>. So, a mortgage of an inheritance to a citizen of London hath been held to be part of his personal estate, and divisible according to the custom<sup>m</sup>.

k. 2 Vern. 193.

l. 1 Vern. 170.

m. 1 Chan. Ca.  
285. 1 Vern. 4.

But if the possessor of the estate conceive himself to hold it in fee, his interest will not be considered as personal against his evident intention; as, if an estate in mortgage be sold by the mortgagee absolutely and fraudulently to a third person, the purchase money, on repayment by the vendor after the death of the vendee, will go to his heir; for the intention of the vendee was to alter the nature of his property, and to invest the money in the purchase of land, and therefore the court will consider



it as real property". So, if it appears to be the intention of the mortgagee that the mortgage should pass by devise as a real estate, the executor will not be entitled". As, where the testator had several mortgages; and among the rest a mortgage in fee of lands in F. and devised his mortgages to his two daughters, their executors, and administrators, and his lands in F. on which he had entered on foreclosure of the mortgage to them, and their heirs: M. one of the daughters died without issue, H. her husband and administrator claimed a moiety of the lands in F. as a mortgage not foreclosed, nor of which the equity of redemption was released, and therefore part of his wife's personal estate; but it was held, that although it were a mortgage, as between a mortgagor and mortgagee, and therefore personalty; yet the testator's intention was, that it should pass to his daughters as a real estate to them and their heirs, and that inasmuch as M. was dead without issue, it descended to her sisters, as her heirs at law, and that H. was entitled to no part of the same in the nature of personal estate". But where a mortgage was devised as real estate after a decree of foreclosure *nisi*, that is, unless cause were shewn to the contrary, it was held to be personal estate for payment of debts, if the assets were insufficient, although considered as real estate between devisor and devisee". A mortgage will not pass as land under a general description applicable to it in point of locality, if, from other circumstances, it be evident that the owner regarded it as personal property".

1 Vern. 271.

2 Burr. 969.

2 Vern. 581.  
Ollb. Rep. in  
Chan. 2 Chan  
Proc. 265.

Moseley, 364.

2 Burr. 969.

Where money secured by mortgage, to which the executor was entitled at law, was articted to be laid out in land, and settled on the issue of the marriage, on special verdict it was adjudged to be bound by the articles\*.

s Vid. 3 P.  
Wms. 217.

If the parson of a church be seised of the advowson in fee, and die, in such case the heir and not the executor shall present; because at the same time the avoidance vests in the executor, the inheritance descends to the heir; and where two titles concur in an instant of time, the elder shall be preferred\*. But if A. be seised of an advowson in gross, or in fee, appendant to a manor, and an avoidance happen in his life-time, his executor and not his heir shall present, inasmuch as it was a chattel vested, and severed from the manor\*. But if the next presentation be granted to A. his heirs and assigns, it is clearly a mere chattel notwithstanding the word "heirs;" It is but one turn, and where the thing is a chattel, the word "heirs" cannot make it an inheritance\*. So, if a man grant the two next presentations of a church, they are chattels, and, if the grantee dies, the executor shall have them, and not the heir\*.

t 11 Vin. Abr.  
169. 3 Bac.  
Abr. 61. 3 Lev.  
47. 3 Salk. 280.  
S. C.

u 11 Vin. Abr.  
145. Fitzh.  
N. B. 33.

w 11 Vin. Abr.  
173. Br. Chat-  
tels, pl. 6.

x 11 Vin. Abr.  
173. Br. Chat-  
tels, pl. 20.

If an inheritor of tithes die after the tithes are set out, they shall go to his executor, and not to his heir\*.

y Com. Dig.  
Biens, A. 2.  
Off. Ex. 60.  
3 Bac. Abr. 64.

z Vid. supr.  
110.

The interest denominated the year, day, and waste, which has been already explained\*, is but a chattel;

chattel; and although granted by the crown to A. and his heirs, shall go to his executors<sup>a</sup>.

<sup>a</sup> 11 Vin. Abr.  
175. Off. Ex.  
54.

Charters and deeds, court rolls, and other evidences of the land, as well as the chests in which they are usually kept, shall pass with the land to the heir, and shall not go to the executor<sup>a</sup>. So, where a bill was filed in chancery for an antique horn, with an ancient inscription, on the ground that it had immemorially gone with the plaintiff's estate, and been delivered to his ancestors by which to hold the land, the court was of opinion, that if the land were of the tenure called cornage, the heir had a title to this monument of antiquity at law<sup>b</sup>. So; if land be sold by A. on condition, that if the purchase money be not paid by a limited day, then that he shall re-enter; and A. die, here, although there be a debt due to the executor, and no land descended to the heir of A. yet the heir shall have the deeds, inasmuch as upon him the condition descended<sup>c</sup>. But if A. deliver a charter to B. to redeliver to him, and his heirs having no title to the land, his executor, and not his heir, shall have this charter, because it was only a chattel without the land<sup>d</sup>.

<sup>a</sup> Off. Ex. 63.  
<sup>3</sup> Bac. Abr. 65.

<sup>b</sup> 3 Bac. Abr.  
65. 1 Vern.  
273. Harg. Co.  
Litt. 307.

<sup>c</sup> Off. Ex. 63.

<sup>d</sup> 11 Vin. Abr.  
145. Fitzh.  
Detinue, pl. 7.

So, if the writings of an estate are pawned or pledged for money lent, they are considered as chattels in the hands of the creditor, and in case of his decease, they will go to his personal representative as the party entitled to the benefit accruing from the loan<sup>e</sup>.

<sup>e</sup> 3 Bac. Abr.  
65. Noy, Max.  
50.

SECT.



## S E C T. II.

*Of chattels personal which go to the heir: and herein  
of heir-looms.*

WITH respect to chattels personal, and animate, the heir has a qualified possessory property, in deer in a park, hares, or rabbits in a warren, doves in a dove-house, pheasants, and partridges in a mew, swans, though unmarked, in a private moat or pond, or kept in water within a manor, or at large, if marked, and in bees in a hive, or, as it has been held by some authorities, though not in a hive, *ratione soli* in respect of his ownership in the soil. He is, also, entitled to fish in a private pond or piscary. These various animals shall all go with the inheritance, for without them it is incomplete<sup>a</sup>. And such, we may remember, is the property that shall vest in the executor, if the testator had a lease for years in the land<sup>b</sup>.

<sup>a</sup> Hargr. Co.  
Litt. 8. Com.  
Dig. Biens. B.  
1 Roll Abr.  
916. Off. Ex.  
53. 11 Vin.  
Abr. 166. 2  
Burn Just 369.  
7 Co. 13 b.  
3 Bac. Abr. 64.  
2 Bl. Com. 427

<sup>b</sup> Harg. Co.  
Litt. 8 not. 10.  
Vid supr. 107.  
113.

<sup>c</sup> Com. Dig.  
Biens. H.  
3 Bac. Abr. 64.  
Off. Ex. 59.

With regard to chattels personal, and vegetable, not only timber-trees, as oak, beech, chesnut, walnut, ash, elm, cedar, fir, asp, lime, sycamore, birch, poplar, alder, larch, maple, and horn-beam, but also trees of every other description, belong to the soil, and, unless severed during the life of the ancestor, are the property of his heir<sup>c</sup>. So, likewise, are all species of fruits, if hanging on the tree at the time of his ancestor's death.

Grass,

Grass, also growing, though ready to be mown for hay, shall descend; with the land, to the heir, for these are either natural or permanent profits of the earth. He is also entitled to such hedges and bushes as are standing at that time<sup>d</sup>.

d Off. Ex. 59.  
3 Bac. Abr. 64.

But, as I have already stated, corn, which is raised by yearly cultivation, shall go to the executor, to compensate for the expence and labour of tilling, manuring, and sowing, the lands, and for the encouragement of husbandry, which is of so public a concern<sup>e</sup>.

e Off. Ex. 59.  
3 Bac. Abr. 64.

The same law, on a similar principle, extends to other emblements, as hops, saffron, hemp, and the like<sup>f</sup>.

f Off. Ex. 59.  
3 Bac. Abr. 64.

It has been asserted by a learned writer<sup>g</sup>, that roots of all kinds, such as parsnips, carrots, turnips, and skirrets, shall go to the heir, since they cannot be taken without digging and breaking the earth, which must of necessity be a detriment to the inheritance. It seems, however, perfectly clear, that these articles, as requiring an annual cultivation, fall within the like reasoning, which the law has adopted in regard to corn, and, consequently, shall belong to the executor<sup>h</sup>.

g Off. Ex. 62,  
63 Vid. also  
Gilb L. of  
Ev. 249.

h Hargr. Co.  
Litt 55. b. 2  
Bl. Com. 193.

But things which produce no annual profit are not comprehended under the name of emblements; therefore, although the testator himself hath sown the land with acorns, or planted it with oaks, alders,

i 2 Bl. Com.  
123. Com. Dig.  
Biens. G. 1.  
Hargr. Co.  
Litt. 55. b.

k Coln. Dig.  
Biens. G. 1.  
Gillb. L. of Ev.  
249. Hargr.  
Co. Litt. 56.

l Hargr. Co.  
Litt. 55. b.  
Cro. Car. 515.  
Vid. supr. 115.

m 3 Bac. Abr.  
64. Off. Ex. 59.  
60.

n 3 Bac. Abr.  
64. Off. Ex. 60.

o 3 Bac. Abr.  
64. Hob. 173.  
11 Co. 50.

alders, elms, or other trees, they shall not be classed as emblements, but shall belong to the heir. So, if the testator improved the natural produce, either by trenching, or by sowing hay-seed, such increase shall go to the heir; for the executors have no property in the natural produce, and, in such instances, that which was artificial cannot be distinguished from it. Wall fruit also, though greatly improved by culture, seems to fall within the same principle, and to be the property of the heir. But the executor, we have seen, is entitled to hops, though growing on ancient roots, for they are produced by manurance and industry.

Although timber trees originally belong to the soil, yet, if A. seised in fee, sell the timber trees on his land to B. and B. die before they are felled, they shall belong to his executor. So, if a man sell his land, reserving the timber trees, they remain in him by particular contract, as chattels distinct from the soil, and shall go to his executor. For, in both these cases, in construction of law, they are abstracted from the earth, although they are not actually severed by the axe.

But, if a tenant in tail sell the timber trees on his soil, such sale will not be effectual without docking the intail, unless they were actually felled in the life-time of such tenant, otherwise they will descend, with the land, to the issue. So, if A. lease lands for life or years, excepting the trees, they



they continue parcel of the inheritance, so long as they are annexed to the land, and descend with it to the heir. So, if a feoffment be made excepting the trees, and the feoffee afterwards buy them, they are re-annexed to, and become part of, the inheritance<sup>p</sup>. So, where a lessee for years purchased trees growing on land, and had liberty to cut them within eighty years, and he afterwards bought the inheritance of the land, and died; it was held, that the executor should not have the trees, for, although they were once chattels, yet, by the purchase of the inheritance, they were reunited to the land<sup>q</sup>.

p Com. Dig.  
Biana. H.  
11 Co. 50.  
4 Co. 63. b.

q 11 Vin. Abr.  
168. Ow. 49.

Such personal chattels inanimate, as go to the heir with the inheritance, and not to the executor, are, for the most part, denominated heir-loom. The termination loom, in the Saxon language, signifies a limb, or member; consequently heir-loom denotes limbs or members of the inheritance. They are such things as cannot be taken away without damaging or dismembering the freehold. Whatever, therefore, is strongly affixed to the inheritance, and cannot be severed from it without violence or damage, *quod ab adibus non facile repellitur*, is a member of the same, and shall pass to the heir, as chimney-pieces, pumps, tables, and benches, which have been long fixed. The law is the same in regard to coppers, leads, pales, posts, rails, window-shutters, windows, whether of glass or otherwise, wainscots, doors, locks, keys, mill-stones fixed to a mill, anvils, and the like.

r 3 Bl. Com.  
427, 428.  
12 Mod. 520.

like. They are annexed to the freehold, and are held to form a part of it.

4 Burr Eccl.  
L. 156. 3 Bac.  
Abr. 63. Off.  
Ex. 62. 4 Co.  
63, 64.

Although pictures and looking-glasses generally go to the executor, as personal chattels, yet, it has been held, that if they are put up instead of wainscot, they shall belong to the heir. He has a right to the house entire, and undefaced.

2 Vern. 508.

But, at so remote a period as that of Henry the seventh, it was adjudged, that if the lessee annexes any chattel to the house for the purposes of his trade, he may disunite it during the continuance of his interest, if he can do so without prejudice to the freehold. And, therefore, that if such lessee be a dyer, and erect a furnace in the middle of the floor, not affixed to any wall, he, and by consequence his executor, may take it down, during the term, if it can be removed without injury to the inheritance; that, while the term continues, he is the owner both of the floor and of the furnace, but that, if it be not severed while his interest subsists, it goes to the lessor, or his heirs inasmuch as the lessee is not master of both the subjects of alteration.

u 3 Bac. Abr.  
63. Keilw 38.  
Ow. 70, 71.  
Off. Ex. 60.  
61. 1 Atk. 477.  
Salk. 368.

In modern times the doctrine of annexation has, on principles of public policy, been gradually relaxing; therefore, if things of this species can be removed without injury to the fabric of the house, or the soil of the freehold, they shall, in general, be the property of the executor.

u 3 Bac. Abr.  
63. in not.  
Ambl. 113.  
2 Str. 1141.

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be he  
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moder

modern tables, although fastened to the floor, grates, iron ovens, jacks, clock cases, in whatever mode annexed to the freehold, have by more recent cases been held to belong to the executor<sup>k</sup>. So, <sup>k 4 Burn Eccl. L. 257.</sup> also have hangings, tapestry, beds fastened to the ceiling, and iron backs to chimnies<sup>l</sup>. So, likewise <sup>l 4 Burn Eccl. L. 256, 259. L. of Ni. Pr. 34. 3 Str. 114. 1 Atk. 477.</sup> in favour of trade, brewing vessels, vats for dyers, and soap-boilers coppers. So also furnaces, though fixed to the freehold, and purchased with the house<sup>m</sup>. It has also been ruled, that a cyder mill erected on the land shall go to the executor, and not to the heir. And in a case where the litigating parties were the executor of the tenant for life, and the remainder-man, the Lord Chancellor seemed to be of opinion, that a fire-engine set up for the benefit of a colliery, as between heir and executor, might in some instances be considered as personal property<sup>n</sup>. Such latitude encourages improvements, and is beneficial to trade. But if the subject be not capable of removal without injury to the freehold; as, if a furnace is so affixed to the wall of a house as to be essential to its support, it shall not be taken away by the executor<sup>o</sup>.

<sup>m Salk. 368. L. of Ni. Pr. 34. 1 Atk. 477. 3 Atk. 14, 16. 11 Vin. Abr. 167, 172. 2 Freem. 349. Hargr. Co. Litt. 53. not g.</sup>

<sup>n Lord Hardwicke in Lawton v. Lawton. 3 Atk. 15.</sup>

<sup>o Off. Ex. 61. 4 Burn Eccl. L. 256. 11 Vin. Abr. 166.</sup>

The ancient jewels of the crown are also held to be heir-looms, for they are necessary to maintain the state, and to support the dignity of the existing sovereign<sup>p</sup>.

<sup>p 3 Bl. Com. 418. Hargr. Co. Litt. 18. b.</sup>

So, also the collar of S. S. is an heir-loom, and shall go to the heir<sup>q</sup>.

<sup>q 11 Vin. Abr. 167. Ow. 124.</sup>

There



f 2 Bl. Com.  
429. Hargr. Co.  
Litt. 18. b.

a 2 Bl. Com.  
422. 13 Co.  
105.

t 2 Bl. Com.  
429. Hargr. Co.  
Litt. 18. b.

n 11 Vin. Abr.  
154.

w Vid. supr.  
137.

x 11 Vin. Abr.  
153. argdo.  
10 Mod. 237.  
vid. also.  
11 Vin. Abr.  
146 pl. 25.  
Dr. & Stud. 90.

y Com. Dig.  
Biens, A. 2.  
2 Vef. 170.

There are also other personal chattels, which descend to the heir in the nature of heir-looms; as ancient portraits of former owners of the mansion, though not fastened to the walls, a monument or tombstone in a church, or the coat-armour of his ancestor there hung up, with the pennons, and other ensigns of honour suited to his degree. Pews, also, in a church, may immemorially descend from the ancestor to the heir, as appurtenant to his house.

By the special custom of some places, carriages, and also various articles of household furniture, and implements, may be heir-looms. But such custom must be strictly proved.

On the other hand, a granary built on pillars in Hampshire, is, by custom, a chattel, and belongs to the executor.

The heir is likewise entitled to other personal chattels inanimate, to which this appellation of heir-looms does not belong. An annuity, although only a chattel-interest, is, as we have seen, descendible to the heir. So, a grant from the crown of one thousand pounds *per annum*, out of the fourth and a half *per cent.* Barbadoes duty, with collateral security for payment out of other revenue, although a mere personal chattel, having no relation to lands or tenements, nor partaking of the nature of a rent, was adjudged to the heir.

So, where a copyhold tenement was burnt down, and money, collected on briefs for rebuilding it, was lodged in the hands of a guardian of the tenant in tail who died under age; it was held that the money should go to his heir, both because of the intail, and because it was copyhold; but that allowance should be made to his personal representative for the amount of the interest of the money from the time it was so lodged to the death of the infant \*.

2 Com: Dig.  
Biens (B)  
1 Vel. 460.

If A. recover land and damages, or a deed relative to land and damages, and die before execution; his heir shall have execution for the land or deed, and the executor for the damages \*.

2 11 Vin. Abr.  
145, 169. Cro.  
Car. 227. Off.  
Ex. 93.

### S E C T. III.

*Of chattels which go in succession.*

CHATTELS given to a corporation aggregate, as the dean and chapter of a cathedral church, the mayor and commonalty of a city, the head and fellows of a college, shall go in succession: but in case of a sole corporation, whether created by charter or prescription, as a bishop, parson, vicar, master of a hospital, and the like, chattels real and personal in possession, and in action, belong to their respective executors. Such property shall no more go to their successors, than it shall go to an heir; for

a Com. Dig.  
Biens. C.  
Franchises,  
F. 16. 4 Co. 65.  
Harg. Co.  
Litt. 9. a.  
b 1 Roll. Abr.  
515.

c 4 Co. 65.  
Dy. 48. a.  
2 Bl. Com.  
430, 431.

d Hargr. Co.  
Litt. 9. a. not 1.  
4 Co. 64. b.  
Cro. Eliz. 464.  
682.

e Harg. Co.  
Litt. 9. a. not 1.  
Vin. Abr.  
tit. Corpora-  
tion L.

f 1 Roll. Abr.  
515.

g 1 Roll. Abr.  
515.

for succession in a body politic is inheritance in case of a private person<sup>d</sup>. So, if the chattel be granted to such sole corporation and his successors: As, if a term for years be granted to a bishop, and his successors, his executor shall have it<sup>e</sup>. So, if an obligation or other specialty be executed to him and his successors, he can take it only as a private individual, and not in his corporate capacity<sup>f</sup>.

But by custom a corporation sole may take goods and chattels in succession, as in London, where the chamberlain is a special corporation for taking bonds for orphanage money. And such custom has been frequently adjudged good<sup>g</sup>. Also in some instances, particularly of chattels in action, the law is the same without a custom<sup>e</sup>. As if the president of the college of physicians recover in debt against a party for practising without a licence his successor, and not his executor, shall have a *scire facias* on the judgment, for the debt was recovered as due to him and the college<sup>f</sup>.

So, if the master of an hospital recover in the character the arrears of an annuity due to the hospital, and die, they go to his successor, and not to his executor<sup>g</sup>.



SECT. IV.

*Of chattels which go to a devisee, or remainder-man: and berein of emblements, and heir-loom.*

A DEVISEE of the lands is entitled to all those chattel interests which have been stated to belong to the heir<sup>a</sup>; and in one respect he has an advantage to which the heir is not entitled. Such devisee, and not the executor of the devisor, shall have the emblements. Thus it has been held, that if A., devised in fee of land, sowed, and devise it to B. for life, remainder to C. in fee, and die before severance, B. shall have the emblements, and not the executor of A. Or, that if B. die before severance, his executor shall not have them, but they shall go to him in remainder. Or that, if the devise be only to B., and B. die before severance, there his executor shall have them, although B. did not sow. These points were so adjudged on the principle, that the devisee, in relation to the chattels belonging to the lands, stands in the place of the executor by the express terms of the will<sup>b</sup>. This distinction, however, seems not very reasonable<sup>c</sup>: It appears strange, that the corn should pass to the devisee as appurtenant to the soil. and yet shall not descend to the heir. But a devisee of the goods, stock, and moveables is entitled to growing corn with preference both to the devisee of the land, and the executor<sup>d</sup>.

<sup>a</sup> 2 Bl. Com. 428.

<sup>b</sup> Winch 57.  
Gilb L. of Ev.  
248. Vid Hob.  
132.

<sup>c</sup> Hargr. Co.  
Litt 55. b.  
note 2.

<sup>d</sup> Winch 57.  
L. of N. Prin.  
34.

In

In respect to the rights of the executor of tenant for life, as opposed to those of the remainder-man, it is a general rule, that where a party hath an uncertain interest in land, and his estate determines, yet he hath a title to the corn that is sown, and the other emblements on the land, though the property of the soil be altered\*. With the view of giving all possible encouragement to agriculture, the law has created a property in the emblements, distinct and separate from that of the soil, and has provided that such property shall be at the entire disposal of the owner, that he may not decline cultivation, lest the harvest should be reaped by a stranger. Moreover, the tenant who has sown has acquired a property in the corn by his expence and labour. It was his own in its original state, and before it was committed to the earth; and his property shall not be divested by its being sown on his own ground, and the less, on account of the skill and industry he has employed in raising it\*.

e Gilb. L. of  
Ev. 240.

f Gilb L. of  
Ev. 240, 241.

On these principles the doctrine of emblements in respect to the executor of tenant for life is founded. Therefore, if such tenant sow the land and die before severance, inasmuch as his estate was uncertain, and determined by the act of God, his executor shall have the corn, and he may take it from off the ground of the remainder-man\*. So, it has been held, that at common law, on the death of tenant in dower, her executor was entitled to the corn; and that the statute of Merton\*, which gives

g Gilb L. of  
Ev. 242.  
Hargr Co.  
Litt. 55 b.  
5 Co. 116.  
Roll. Abr. 726,  
727.

h 20 H. 3. c. 2.

er the power of devising it, was passed only in  
firmance of the common law<sup>l</sup>.

<sup>l</sup> Gilb. L. of  
Ev. 245.  
Hargr. Co.  
Litt. 55. b.

If A., seised in fee of land, sow, and then con-  
vey it to B. and die, before severance, the corn  
shall belong to B. and not to the executor of A.  
on the principle, that every man's donation is to  
be taken most strongly against him, and, therefore,  
it shall pass not only the land itself, but also the  
chattels, which are incidental to it<sup>k</sup>. If A., seised  
in fee of land, sow, and then convey it to B. for  
life, with remainder to C. for life, and B. die be-  
fore the corn is reaped, C. shall have it, and not  
the executors of B., for B. had no property in the  
corn arising from his own charge, and industry,  
but merely by A.'s donation of the land, to which  
the corn is appurtenant; and by force of the same  
donation, by which B. had a right to the corn, C.  
is entitled to it after the death of B.<sup>l</sup>

<sup>k</sup> Gilb. L. of  
Ev. 247.

<sup>l</sup> Gilb. L. of  
Ev. 247. Hob.  
132. Roll. Abr.

If A., seised in fee, sow land, and give it to B.  
for life, remainder to C. for life; and they both  
die before severance, it shall go to A.; for when  
the force of the donation is spent, the property  
shall result to the donor<sup>m</sup>. If disseisor of tenant  
for life sow the land, and such tenant die before  
severance; his executor, and neither the disseisor  
nor the reversioner, shall have the corn<sup>n</sup>. But  
trees shall not be regarded in favour of the execu-  
tor of the tenant for life, any more than of any  
other executor, as emblements, or as distinct from  
the soil; for they are parcel of the inheritance,

<sup>m</sup> Gilb. L. of  
Ev. 248.  
Hob. 132.

<sup>n</sup> 3 Bac. Abr.  
64. Goulds.  
143.

M

and



• Gilb. L. of  
Ev. 242. 2 Bl.  
Comm. 123. Co.  
Litt. 25. b.

p. 1. L. of  
Ev. 249. Com.  
Dig. Biens.  
G. 1. H. Harg.  
Co Litt. 55. b.  
Lat. 270.

q Com. Dig.  
Biens. H.  
4 Co. 63. b.

r Com. Dig.  
Biens H. 4 Co.  
63. 11 Co. 82.

s Com. Dig.  
Biens H.  
Al. 21.

t Com. Dig.  
Biens. H.  
Hargr. Co.  
Litt. 220.  
Moore 327.  
11 Co. 82. b.

u 11 Co. 84.  
1 Roll. Rep.  
183.

and are planted for the benefit of future generations<sup>r</sup>. Therefore, if such tenant plant oaks, or other timber trees, or trees not timber, or hedges or bushes, they shall not go to his executor, but to him in remainder<sup>p</sup>. If, as we have seen, the tenant in fee make a lease, excepting the trees, and afterwards grant the trees to the lessee, they are not re-annexed to the inheritance, but the lessee has an absolute property in them, and they shall go to his executor<sup>q</sup>.

But if the tenant by the courtesy, or in dower or after possibility of issue extinct, cut down trees they shall not go to the executor, but to the remainder-man, or reversioner<sup>r</sup>. So, if A., tenant for life, with remainder to B. for life, cut down trees, they shall belong to him in reversion<sup>s</sup>.

Yet, if there be a lessee for life, or years, without impeachment of waste, he has such an interest and property in timber trees, that, in case they are cut down in his life-time, or during the term, they shall belong to his executor<sup>t</sup>.

If the trees are thrown down by tempest in the life-time of such lessee, or during the term, they shall go to his executor, and vest equally as if they had been severed by the act of the party. But a lessee, though without impeachment of waste, has not an absolute property in the trees; for if they are not cut down in his life-time, or during the term, his executor shall not have them, but the

shall go to the lessor, as annexed to the freehold. w 1 Roll. Rep. 182. Lat. 270.  
So, if A., tenant for life, without impeachment of waste, with power to cut trees, and to make leases for three lives, lease for three lives, excepting the trees, and die before they are cut, the trees are re-annexed, and shall not be severed by his executor. x Lat. 163.

A tenant *pur auter vie*, is considered by the law, in regard to emblements, in the same light as a tenant for his own life; and, therefore, if a man be tenant for the life of another, and the *cestui que vie* die after the corn be sown, the tenant *pur auter vie*, and in case of his death, his executor, shall have the emblements. y 2 Bl. Com. 323.

The advantages of emblements are also extended to the parochial clergy, by the stat. 28 H. 8. c. 11. z 2 Bl. Com. 123.

The lessees of tenants for life at common law, on the death of the lessors, exercised the unreasonable privilege of quitting the premises, and paying rent to nobody for the occupation of the land subsequent to the last quarter-day, or other day assigned for the payment of rent. To remedy which, it is now enacted by stat. 11 Geo. 2. c. 19. § 15. that the executors of tenant for life, on whose death any lease determined, shall recover of the lessee a rateable proportion of rent from the last day of payment to the death of such lessor. a 2 Bl. Com. 124.

If a lessee for life of a manor seize an estray, and die before the year and day are elapsed, it shall be long to his executor <sup>b</sup>.

<sup>b</sup> 11 Vin Abr.  
145. Moore 11.

In regard to heir-looms, I have already stated, that the strictness of the ancient rule has in later times been relaxed, as between the executor and the heir <sup>c</sup>. But it has been still more so, as between the executors of tenant for life, or in tail, and the reversioner <sup>d</sup>.

<sup>c</sup> Supr. 152.

<sup>d</sup> L. of Ni. Pr.  
34.

Hence it has been adjudged, that a fire-engine set up for the benefit of a colliery by tenant for life, or in tail, shall be considered as his personal estate, and shall go to his executor, and not to the remainder-man. And indeed reasons of public convenience operate more strongly as between such parties, than even as between heir and executor. A tenant for life would be discouraged from making improvements, if the benefit of them might devolve not on his personal representatives, but on a remote remainder-man, perhaps the next day after the improvements were effected <sup>e</sup>.

<sup>e</sup> Lawton v.  
Lawton,  
3 Atk. 13.  
Lord Dudley  
v. Lord  
Warde,  
Ambl. 113.



## C H A P. V.

## OF THE CHATTELS WHICH GO TO THE WIDOW.

## S E C T. I.

*Of the chattels real which go to the widow: and herein also of such chattels real as belong to the surviving husband.*

**I**N contemplation of law, a complete unity of persons subsists between the husband and wife. As long as the relation continues, they are regarded as one individual. The very existence of the wife is suspended during the coverture, or entirely merged or incorporated in that of the husband. On this principle, whatever personal property belonged to her when sole, is vested in the husband by the marriage.

2 Bl. Com.  
433. Com. Dig.  
Baron & Feme,  
D. 1.

And, first, in regard to chattels real: Some are in the nature of a present vested interest, in others she has only an interest possible, or contingent. Of the first class are leases for years, estates by statute-merchant, statute-staple, or elegit, or any other chattel real in her possession. The second class is distinguished into such as are called possibilities, and such as are denominated contingent interests; as, if a term of years be devised to A. for life, and  
after

after A.'s death to B. B.'s interest in the residue of the term operates by way of executory devise, and is styled a possibility. But, if a real estate be limited to A. for life, and after the decease of A., and if B. die in A.'s life-time to C. for a term of years, this operates not as an executory devise, but as a remainder, and, therefore, is considered as a contingent interest<sup>b</sup>.

<sup>b</sup> Hargr. Co.  
Litt. 351. not. 1.

<sup>c</sup> Plowd. 418.

<sup>a</sup> Bl. Com. 435.

In the chattels real of the wife, present and vested, an interest in the nature of a joint-tenancy of the husband and wife is created by the marriage, and is a consequence of their legal unity, but subject to alienation by the husband in his life-time<sup>c</sup>; for example, in case of a lease for years, he shall, during the coverture, receive the rents and profits of it; but if he does nothing more, on his dying before his wife, it shall survive to her, and shall not go to his executor; but he may during the coverture alienate it, either directly, or consequentially, by such acts as shall induce an alienation. He may sell, surrender, or dispose of it in his life-time at his pleasure. On his attainder or outlawry, it shall be forfeited to the king, or it may be taken in execution for his debts<sup>d</sup>.

<sup>d</sup> 2 Bl. Com.  
434. Hargr. Co.  
Litt. 46. b.  
Plowd. 263.

He has also during coverture a right to assign such possible, and contingent interests as have been just mentioned, unless, perhaps, in those cases where the possibility, or contingency is of such a nature that it cannot happen during his life. As where a lease is granted to the husband and wife for

for their lives, with remainder to the executors of the survivor. Or unless in equity at least, the future or executory interest in a term, or other chattel, were provided for the wife with the consent of the husband before marriage, for in that case his disposition of it would be a breach of his own agreement.

2 10 Co. 51.  
Hargr. Co.  
Litt. 46. b.  
Com. Dig. Ba-  
ron & Feme,  
E. 2.

f Hargr. Co.  
Litt. 351. not. 1.

If the husband dispose not of the chattels real of the wife in his life-time; and die before her, they shall not pass by his will, nor shall they go to his executor; for, not having altered the property in his life-time, they were never transferred from the wife; but, after his death, she shall remain in her ancient possession.

g 2 Bl. Com;  
434. Plowd.  
418.

But, if the husband grant the term, on condition that the grantee shall pay a sum of money to his executors, though the condition be broken, and the executors enter, this is a disposition of the term, and the wife is barred of it, for the whole interest was passed away.

h Com. Dig.  
Baron & Feme,  
E. 2. Hargr.  
Co. Litt. 46. b.

If the husband and wife be ejected of the term, and the husband bring an ejectment in his own name only, and recover, this also is an alteration of the term, and vests it in the husband; for his suing alone is expressive of his intention to divest the wife of her interest, and to treat the term as exclusively his own.

i 1 Roll. Abr;  
359. Hargr.  
Co. Litt. 46. b.  
Sed vid. not. 6.  
ibid.

If



If he submit the term to the arbitration of A, who awards it to B, it will be a disposition by the husband against his wife<sup>1</sup>. So, the husband may make a lease of the term, to commence after his death, and it shall be good, although the wife survive<sup>2</sup>; but he cannot charge such chattel real beyond the coverture; as, if he grant a rent-charge out of the term, and the wife survive, she shall avoid the charge, for by her survivorship she is remitted to the term, of which the coverture did not divest her<sup>3</sup>.

1 Cro. Fliz. 287.  
Poph. 3.  
m Hargr. Co.  
Litt. 35.  
Plowd. 418.

n 1 Roll. Abr.  
344. 346.  
o 1 Roll. Abr.  
346.

p 2 Roll. Abr.  
157. 1 Roll.  
Abr. 346.

q Hargr. Co:  
Litt. 46. b.  
r 1 Roll. Abr.  
344.

s 1 Roll. Abr.  
344.

Nor if there be judgment against her, can execution be sued out after his death against the term<sup>4</sup>: nor shall it after his death be extended on a statute or recognizance acknowledged by him<sup>5</sup>; nor, as it seems, for a debt due from him to the king<sup>6</sup>. Nor has his disposition of part of the term the effect of a disposition of the whole. As, if A, be possessed of a term for forty years in right of his wife, and grant a lease for twenty years, reserving a rent, and die; although the executors of the husband shall have the rent, for it was not incident to the reversion, inasmuch as the wife was not party to the lease, yet she shall have the residue of the term<sup>7</sup>. If the term be extended, the wife shall have the term after the extent is satisfied<sup>8</sup>. If the husband and wife mortgage the term, and the husband pay the money, and enter and die, the wife shall have it<sup>9</sup>. If the wife and her husband were joint-tenants of a rent-charge for their lives; the wife, in case she survive, shall have the arrears incurred

incurred during the coverture<sup>2</sup>. If the husband and wife make a lease reserving rent, and she assents after the death of the husband, she shall have the arrears incurred in his life-time<sup>3</sup>. Or, if the husband be entitled to an advowson in right of his wife, and, after an avoidance, but before presentation die, his wife and not his executors shall present<sup>4</sup>.

1 Roll. Abr.  
350. Moore  
887.

2 1 Roll. Abr.  
350.

3 w Com. Dig.  
Baron & Feme,  
B. 3. Co. Litt.  
351.

In case the wife die before the husband, all the chattels real of the wife, in which there exists a present, actual, and vested interest, become absolutely and entirely his own by survivorship<sup>5</sup>, and that without taking out administration to her<sup>6</sup>. To entitle himself to her chattels real, which are not so vested, he must make himself her representative, by becoming her administrator. It seems formerly to have been doubted, whether, if, having survived his wife, he died during the suspense of the contingency on which any part of his wife's property depended, his representative, or his wife's next of kin, had a right to the benefit of it; but by a series of authorities it is now settled, that the husband's representative is beneficially entitled, as well to this species of the wife's property<sup>7</sup>, as to any other, which devolved to him either as survivor, or by virtue of the grant of administration. And, although the husband's right to such grant be personal only, and not transmissible, and, as I have before stated<sup>8</sup>, the spiritual court be in such case obliged by the stat. 31. E. 3. to commit administration to the next of kin of the wife, yet such grantee

4 1 Co. Litt. 300.  
Com. Dig.  
Baron & Feme,  
E. 2.

5 y Com. Dig.  
Baron & Feme,  
E. 2. Roll. Abr.  
345.

6 z Hargr. Co.  
Litt. 35 n.  
not. 1.

7 a Supr. 36.

grantee is regarded in equity, as a mere trustee for the representative of the husband <sup>b</sup>.

<sup>b</sup> Sed vid.  
Hargr. Co.  
Litt. 351.  
not. f. 1 Hargr.  
Law Tr. 475.  
in not.

<sup>c</sup> Moore 7.

<sup>d</sup> Com. Dig.  
Baron & Feme,  
E. 3. Hargr.  
Co. Litt. 351.

<sup>e</sup> Com. Dig.  
Baron & Feme,  
E. 2.  
1 Fonbl. 98.  
1 Vern. 7. 18.  
2 Vern. 270.  
2 Atk 421.  
Sed vid. 2 Bro.  
Chan. Rep 345.

<sup>f</sup> Com. Dig.  
Chancery 2 M.  
9. Hargr. Co.  
Litt. 351. not 1.

<sup>g</sup> Hob. 3.

<sup>h</sup> Gilb. L. of  
Ev 245. Hargr.  
Co. Litt. 55. b.

<sup>i</sup> Gilb. L. of  
Ev 246.  
Hargr. Co.  
Litt 55. b  
not. 5. Roll.  
Abr 727.

If tenant in dower grant a lease for years, and marry and die, the husband shall have the rent in arrear in his wife's life-time <sup>c</sup>. And by the stat. 32 Hen. 8. c. 37. arrears of rent due as well before as after coverture to the wife, seised in fee, in tail, or for life, are on her death given to the husband. If the husband be entitled to an advowson in right of his wife, and he survive, he shall have an avoidance which happened during the coverture <sup>d</sup>. If a wife were possessed at her marriage of a trust term to her separate use, the surviving husband shall be entitled to it except in special cases <sup>e</sup>; as, if, before marriage, it was settled on her with the assent of the husband <sup>f</sup>. If the husband and wife mortgage a term of the wife, and the husband survive, he shall have the equity of redemption <sup>g</sup>.

If the husband sow the land, of which he is seised in right of his wife, and she die, he shall have the profits <sup>h</sup>. Or, if he die before the wife, and before severance, his executors shall be entitled to them; but it seems, that in the event of his so dying, if the lands were sown before the marriage, the wife shall have the profits, and not the executors of the husband; for the corn committed to the ground belongs to the freehold, and is not transferred to the husband, and therefore as it was undisposed of in his life-time, it devolves to the wife. So, if A. seised in fee, sow copyhold lands, and surrender



Surrender them to the use of his wife, and die before severance, it seems that the wife shall have the corn, and not the executors of the husband; for this is a disposition of the corn as appurtenant to the land, and, since the husband disposed of it during his life, it cannot belong to his executors<sup>k</sup>. But, if the husband and wife be joint tenants, and the husband sow the land, and die, it seems, the corn shall go to the executor of the husband, for the land is not cultivated by a joint stock; the corn is altogether the property of the husband, and it shall not be lost by being committed to their joint possession, any more than if it had been sown in the land of the wife only<sup>l</sup>.

<sup>k</sup> Roll. Abr. 727.

<sup>l</sup> Gilb. L. of Ev. 245. Roll. Abr. 727. Sed vid. Hargr. Co. Litt. 55. b et not 7. Vin. Abr. tit. Emblements, pl. 16. Com. Dig. Biens. C. 2.

## SECT. II.

*Of the chattels personal which go to the widow: and herein, of such personal chattels of the wife as go to the surviving husband.*

CHATTELS personal, or *choses* in action, as debts on bond, simple contracts, and the like, do not vest in the husband, until he receives, or recovers them at law. When he has thus reduced them into possession, they become absolutely his own, and, at his death, shall go to his representatives, or as he shall appoint by his will, and shall not re-vest in his wife<sup>a</sup>.

<sup>a</sup> Bl. Com. 434. Hargr. Co. Litt. 351.

In

b Com. Dig.  
Baron & Feme.  
V. 1. Roll. Abr.  
247. Ow. 82.  
Cro Eliz 537.  
2 Vef. 676.  
1 Sid. 25.

c 2 Lev. 107.  
3 Lev 403.  
Al 36. Vid. 7  
Term Rep. 349.

d Com Dig.  
Baron & Feme,  
V. Hargr. Co.  
Litt 351. not.  
1. 2 Vef 676.  
1 Vern. 396.

e 3 Atk. 21.

f 2 Bl. Com.  
434 Hargr.  
Co. Litt. 351.

In respect to such *choses* in action as vested in the wife before her marriage, the husband must sue jointly with her to recover them<sup>b</sup>. As to such of the wife's *choses* in action, as accrued subsequent to the coverture, he may sue either in their joint names, or alone, at his pleasure<sup>c</sup>.

If he join her in the action, and recover judgment, and die, the judgment will <sup>not</sup> survive to her, on the principle, that his bringing the action in his own name alone, is a disagreement to the wife's interest, and indicates his intention, that it shall not survive to her. But, if he bring an action in the joint names of himself and his wife, the judgment is, that they both shall recover, and, therefore, such action does not alter the property, nor imply an intention on his part to do so, and, consequently, the surviving wife, and not the representative of the husband, is intitled to a *scire facias* on the judgment<sup>d</sup>.

Indeed it has been asserted by great authority that, even in the case of the husband's suing alone for the wife's debt, and a dying before execution his wife, and not his executors, shall be thus entitled<sup>e</sup>.

Such chattels shall, *à fortiori*, survive to her if the husband die before he has proceeded to reduce them into possession<sup>f</sup>. Hence a portion due to an orphan in the hands of the chamberlain of London, unless it be recovered or received by the husband

husband, shall, on his death, go to his wife, and not to his executor, for it is clearly a *chose* in action. So, if a debt be due to the wife, although the debtor become bankrupt, and the husband claim the debt, and pay the contribution-money, and die before any dividend, his wife, and not his executor, shall receive the debt, for by such payment the property shall not be altered<sup>h</sup>. So, if an estray come into the wife's franchise, in case the husband die without seizing it, his wife, and not his executors, are entitled to the seizure: In all these cases the husband's right is determined with the coverture<sup>1</sup>.

g Com. Dig.  
Baron &  
Feme. E. 3.  
2 Vent. 341.  
Ca. Ch. 182.

h Com. Dig.  
Baron &  
Feme. E. 3.  
2 Vern. 707.  
But now see stat.  
5 Geo. 2. 3. 30.  
§ 25. in regard  
to contribution.  
i 2 Bl. Com.  
434. Pargr.  
Co. Litt. 351. b

But, if the husband grant a letter of attorney to A. to receive a debt, or legacy due to the wife, and A. receive it, but, before he pays it over, the husband die, it shall be considered as having vested in his possession, and shall go to his executors<sup>k</sup>. Such are the principles of law on this subject; but in equity, it is held, that a settlement before marriage, if made in consideration of the wife's fortune, entitles the representative of the husband, during in her life-time, to her *chofes* in action. But it has been asserted, that if it be not made in consideration of her fortune, the surviving wife will be entitled to the things in action, the property of which has not been reduced by the husband. So, if it be in consideration of part of her fortune, such things in action, as are not comprised in that part, it is said, survive to the wife.

And,

k Roll. Abr.  
342. Moore  
452.



And, in a case where a settlement was made to provide for the wife, without mentioning her personal estate, the Lord Keeper decreed, that such estate should belong to the representatives of the husband, and held, that in all cases where there is a settlement equivalent to the wife's portion, it shall be intended that the husband shall have the portion, although there be no agreement for that purpose<sup>m</sup>.

in Harg. Co.  
Litt. 351. not.  
1. 3 P. Wms.  
200. not. D.  
Prec. Chan. 63.  
412. 2 Vern.  
302. Ca. Temp.  
Talk. 168.

Equity, also, considers money due on mortgage as a *chose* in action, and it seems to have been formerly understood, that, since the husband could not dispose of lands mortgaged to the wife in fee without her, and the estate remained in her, she or her representatives, were entitled to the money as incident to it; but, that in regard to a mortgage debt, secured by a term of years, as the husband had an absolute power over the term, there was no obstacle to the debt's vesting in his representatives; but this distinction is exploded, and it is now held, that, although, in case of a mortgage in fee, the legal fee of the lands in mortgage continue in the wife, she is but a trustee, and the trust of the mortgage follows the property of the debt<sup>n</sup>.

n Harg. Co.  
Litt. 351. not.  
11. P. Wms.  
458. 2 Atk.  
207.

If the husband and wife have a decree in equity in right of the wife, and the husband die, the benefit of the decree belongs to the wife, and not the executor of the husband<sup>o</sup>.

o Hargr. Co.  
Litt. 351. not.  
11. Chan. Ca.  
27.

But, if the wife's fortune be in the court of chancery, on the husband's death his representatives shall be entitled to it, subject to the same equity as before, in favour of the wife. In case of her death it shall become the absolute property of the husband; and it has been held, even where the court detained the fund, in order to enforce a provision for the wife, and made a decree for that purpose, and she survived her husband, yet, that on her death, his representatives were entitled to it, inasmuch as it had absolutely vested in him by law. In these cases, it seems to make no difference, whether there be any issue of the marriage, or not<sup>p</sup>.

p 1 Fonbl. 38,  
39. Prec.  
Chan. 418.  
Ambl. 509.

In case the husband survive the wife, her chattels real, as we have seen, shall become his absolute property. But her *choses* in action shall go to her representatives, excepting the arrears of rent due to her, which, as I have before stated, on her death are, by stat. 32 Hen. 8. c. 37. given to the husband. The ground of the distinction is this: The husband is in absolute possession of the chattel real during coverture, by a kind of joint-tenancy with his wife, and therefore the law will not wrest it from him, though if he had died first it would have survived to the wife, unless he had altered the possession in his life time: but a *chose* in action was never in his possession: He could acquire it only by suing in his wife's right, and, as after her death he cannot as husband bring an action in her right, because they are no longer one and the

the same person in law, therefore he can never as such recover the possession. But, in the capacity of her administrator, he may recover such things in action as become due to her before, or during the coverture<sup>q</sup>.

<sup>q</sup> 2 Bl. Com.  
435.

In chattels personal, or *choses* in possession of the wife in her own right, as ready money, jewels, household goods, and the like, the husband hath an immediate, absolute, and actual property devolved to him by the marriage, which never can revert in the wife, or her representatives<sup>r</sup>.

<sup>r</sup> 2 Bl. Com.  
435 3 Pac.  
Abr 65. Dr. &  
Stud. Dial. 1.  
cap. 7.

Such chattels also as are given to the wife after the marriage shall belong to the husband, and he shall be entitled to them, although they had not come to his possession at the time of her death<sup>s</sup>. Thus it hath been held, that if a legacy be left to a wife, to be paid twelve months after the testator's death, and the wife die within that period, her husband is entitled to it, for an immediate interest was vested in him, and subject to his release before the time of payment<sup>t</sup>.

<sup>s</sup> Com. Dig.  
Baron & Feme.  
E. 3. 1 Mod.  
179.  
1 Sid. 337.

<sup>t</sup> Com Dig.  
Baron &  
Feme. E. 3.  
2 Roll Rep.  
134.

Such are the legal consequences of the unity of husband and wife; but courts of equity, although they recognise the rule of law, which considers the husband and wife as one person, yet, in some cases, will treat their interests as distinct<sup>u</sup>. If property be given generally to the wife, it shall vest in the husband, both in law and equity; not

<sup>u</sup> 1 Fonbl. 87.  
Prec. Chan. 24.  
1 Atk. 272.



shall it be supposed to be for her separate use; though she live apart from the husband. But where it is given to the separate use of the wife, she shall be entitled to it in equity independently of her husband. And though it were always clear, that she was thus entitled to such property, if trustees were interposed, yet it was formerly a doubt, whether she could take it where none were appointed. It is now, however, settled in the affirmative. It has been held, that, where A. devised lands in fee to his daughter, a feme covert, for her separate use, without naming trustees, it should be a trust in the husband, for it makes no difference, whether the trust be created by the act of the party, or by the act of the law. So, where a bond was bequeathed to a wife, for her sole and separate use; and no trustees nominated, it was held to be completely vested in her in equity.

1 Vern. 261.  
2 Vern. 659.

2 Ves. 452.

1 Fonbl. 98.  
1 P. Wms 126.  
2 P. Wms 79.

2 P. Wms.  
316. 3 Atk.  
399. Com. Dig.  
Baron &  
Feme. D. 1.

3 Bank. 187.

And equity will not only raise a trust, where the gift is expressly for the separate use of the wife, but will infer it from words not technical, or from the circumstances under which the gift is made, or, as it seems, merely from the nature of the subject; thus, where an estate was given to a husband, for the livelihood of his wife, he was considered as a trustee for her separate use. So, where diamonds were given to the wife by the husband's father, on her marriage, it was held, that they were a gift to her separate use, and that she was in equity entitled to them in her own right.

1, 3 Atk. 399.

c. 3 Atk. 393.

N

And,

And, where a foreigner made the wife a present of trinkets, though not expressly for her separate use; Lord Hardwicke, C. seemed to think they should be so construed.

c 1 Fonbl. 98.  
3 Atk. 393.

Gifts, likewise, from the husband to the wife, although the law does not allow the property to pass, shall, without prejudice to creditors, be supported in enquiry, whether trustees be interposed, or not. Thus, where the husband transferred one thousand pounds South Sea annuities in the name of his wife, she was held entitled to them, as given to her separate use. So, trinkets given to the wife by the husband, in his life-time, were decided to be her separate estate. And, where a husband allowed his wife to make a profit of all butter, poultry, fruit, and other trivial matters arising from the farm, beyond what was used in the family, out of which she saved one hundred pounds, which the husband borrowed, on his death, the court of chancery allowed the agreement, as a reasonable encouragement of the wife's frugality, and admitted her to come in as a creditor for that sum. So, where the husband agreed that the wife should take two guineas of every tenant, beyond the fine paid to the husband for the renewal of a lease, this was allowed to be the wife's separate money. But, in all such cases, to entitle the wife to such allowance, there must be a sufficient fund for the payment of debts. Nor will the court, in any case, permit a gift of the whole of the husband's estate, while he is living,

d 1 Atk. 270.

e 1 Atk. 271.  
3 Atk. 393.

f 3 Atk. 393.

g 3 P. Wms.  
337.

h 3 P. Wms.  
339: 1 Fonbl  
95.

i 3 P. Wms. 339.

ing, for that would not be in the nature of a mere provision, which is all she is entitled to.

3 Atk. 72.

But, if the husband and wife live together, and he provide her with cloaths and other necessaries, and she demand not, but suffer him to receive the rents and profits of her separate estate, or her pin-money, or if she accept payments short of what she is entitled to on his death, neither she, nor her representatives, shall have an account of such separate estate, farther back than a year, for she shall be presumed to have waived her right to the antecedent produce. Yet, under particular circumstances, it may be otherwise; as where the wife had three hundred pounds *per annum* pin-money, and the husband, for several years before his death, paid her only two hundred, but promised her that she should have the whole at last, she was held entitled to all the arrears.

k 2 P. Wms.  
32, 340. 3 P.  
Wms. 355.  
a Vef. 7. 190.

1, 2 Atk. 269.  
See also, 1 Eq.  
Ca. Abr. 140.  
pl. 7.

In like manner shall she be entitled to all arrears, if she lived separate from her husband.

3 Atk. 695:  
Vef. 298.

But, if A. proposing to give a married woman money for her separate use, and, to secure it, give her a note for a certain sum, as received, promising to be accountable, it shall be assets in the hands of the executor of the husband. So, likewise, if a married woman deposit money in A.'s hands, to be kept for her separate use, it shall be considered as part of the husband's estate.

1, 2 Atk. 269.  
See also, 1 Eq.  
Ca. Abr. 140.  
pl. 7.



## S E C T. III.

*Of the wife's paraphernalia.*

2 Bl. Com.  
435. 3 Bac.  
Abr. 66. Off.  
Ex. Suppl. 61.  
62. 11 Vin.  
Abr. 178.

THE wife, also, may acquire a legal property in certain effects of the husband at his death, which shall survive to her over and above her jointure or dower, and be transmissible to her personal representatives.

p Com. Dig.  
Baron &  
Feme. F. 3.  
1 Roll. Abr.  
911. Swinb.  
part 6. f. 7.  
q Cro Car. 343.  
13 Ark. 394.

Such effects are styled paraphernalia; a term, which, in law, imports her bed, and necessary apparel, and also such ornaments of her person as are agreeable to the rank and quality of the husband. Pearls and jewels, whether usually worn by the wife, or worn only on birth-days, or other public occasions, are also paraphernalia.

4 3 Bac. Abr.  
66. Cro Car.  
343.

To what amount such claims shall prevail is a point which cannot admit of specific regulations. It must be left, on the particular circumstances of the case, to the discretion of the court.

2 Leon. 166.  
Moore 213.

u Cro. Car.  
343. Jon. 332.  
Roll. Abr. 911.  
11 Vin. Abr.  
179. S. C.

In the reign of Queen Elizabeth, jewels, to the value of five hundred marks, were allowed, in the case of the wife of a viscount. A diamond chain, of the value of three hundred and seventy pounds, where the lady was the daughter of an earl, and wife of the king's serjeant at law, in the reign of Charles the first, was considered as reasonable.

Jewels

Jewels and plate, bought with the wife's pin-money, to the amount of five hundred pounds, which bore a small proportion to the husband's estate, were regarded in the same light<sup>v</sup>: And Lord <sup>w Prec. Chan,</sup> Hardwicke, C. held the widow of a private <sup>27.</sup> gentleman to be entitled to the jewels worth three thousand pounds, as her paraphernalia, and that the value made no difference in the court of chancery<sup>v</sup>. By the custom of London, a citizen's wi- <sup>x 2 Ask. 77.</sup> dow may retain some of her jewels as paraphernalia, but not all<sup>v</sup>.

y 11 Vin. Abr.  
180. Nelf.  
Chan. Rep. 179.

If the husband deliver cloth to the wife for her apparel, and die before it be made, she shall have the cloth, as of this species of property<sup>v</sup>. If the <sup>x 1 Roll. Abr.</sup> husband present his wife with jewels, for the ex- <sup>911.</sup> press purpose of wearing them, they shall be esteemed merely as paraphernalia, for, if they were considered as a gift to her separate use, she might dispose of them absolutely, and so defeat his intention<sup>v</sup>.

2 3 Ask. 398,

The husband, if inclined to so unhandsome an exercise of his power, may sell or give away, in his life-time, such ornaments and jewels of the wife, but he cannot dispose of them by will<sup>v</sup>. <sup>b 2 Bl. Com.</sup> In case of a deficiency of assets for payment of <sup>436. 3 Ask. 394.</sup> debts, the widow shall not be entitled to such pa- <sup>c 1 P. Wms.</sup> raphernalia<sup>v</sup>, not even, if they were presents made <sup>730. 3 Ask.</sup> to her by the husband before marriage<sup>v</sup>; nor shall <sup>369. Moore<sup>v</sup></sup> she be so entitled where there are not assets at the <sup>216. 3 Bro. P.  
C. 187.</sup> time <sup>d 2 Ask. 104.</sup>

c 1 P. Wms.  
80.

time of the husband's death, although contingent assets should afterwards fall in.

f 2 P. Wms.  
80. not. 1.  
1 P. Wms. 729.  
2 P. Wms. 542.  
2 Vef. 7.

But, such ornaments, though subject to the debts, shall be preferred to the legacies of the husband, and the general rules of marshalling assets, (which will be treated of hereafter,) are applicable in giving effect to such priority.

g 3 Atk. 395.

If the husband pawn his wife's paraphernalia, and die, leaving a fund sufficient to pay all his debts, and to redeem the pledges, she is entitled to have them redeemed out of the personal estate. So, where a husband pledged a diamond necklace of the wife, as a collateral security for money borrowed on a bond, and authorised the pawnee to sell it, during his absence, at a sum specified, it was held that this amounted not to an alienation, if it were not sold in his life-time, and that it was redeemable for his widow.

h 3 Atk. 393.

i 3 Bac. Abr.  
66. Com. Dig.  
Baron &  
Feme. F. 3.  
2 Vern. 49, 83

If a woman, by marriage articles, agree to claim such part only of the effects of the husband as he shall give her by his will, she is excluded from her paraphernalia. But her necessary apparel shall, in all cases, be protected, as decency and humanity require, even against the claims of creditors.

k 2 Bl. Com.  
436. 2 Roll.  
Abr. 911.

If the husband bequeath to the widow her jewels, for her life, and then over, and she make no election to have them as her paraphernalia, her executor shall have no title to demand them.

l 2 Vern. 246.



## CHAP. VI.

## OF THE INTEREST OF A DONEE MORTIS CAUSA.

**A**NOTHER species of interest in the personal property of the deceased remains to be considered. Such as vests neither in his executor, nor his heir, nor his widow, in those respective characters. It is created by a gift under the following circumstances. When in his last illness, and apprehensive of the approach of death, he delivers, or causes to be delivered to a party, the possession of any of his personal effects to keep in the event of his decease. Such gift is therefore called a *donatio causa mortis*. It is accompanied with the implied trust, that, if the donor live, the property shall revert to him, since it is given only in contemplation of death<sup>a</sup>.

<sup>a</sup> 2 Bl. Com.  
514. 11 Vin.  
Abr. 176. Prec.  
in Chan. 269.

To substantiate the gift, there must be an actual tradition or delivery of the thing. The possession of it must be transferred in point of fact. The purse, the ring, the jewel, or the watch, must be given into the hands of the donee, either by the donor himself or by his order<sup>b</sup>. But there are cases, in which the nature of the subject will not admit of a corporeal delivery; and then if the party goes as far as he can towards transferring the possession, his bounty shall prevail. Thus, a ship has been held to be delivered, by the delivery of a bill of sale defeasible on the donor's recovery. And in

<sup>b</sup> 2 Vef. 431.  
<sup>c</sup> Vef. jun. 111.  
1 P. Wms. 404,  
441.

in a recent case, the Lord Chancellor seemed to be of opinion, that such donation might be effected by deed or writing<sup>c</sup>.

c 2 Vef. jun.  
120.

The delivery also of the key of a warehouse, in which goods of bulk were deposited, has been determined to be a valid delivery of the goods for such a purpose<sup>d</sup>. So the delivery of the key of a trunk, has been decided to amount to a delivery of the trunk, and its contents<sup>e</sup>. Nor in those instances were the key and bill of sale considered in the light of symbols, but as modes of attaining the possession and enjoyment of the property<sup>f</sup>. So a bond given in prospect of death, although a *chose* in action, is a good donation *mortis causa*, for a property is conveyed by the delivery<sup>g</sup>. Such, likewise, have been the decisions in regard to bank notes<sup>h</sup>. In all these cases, the donor delivers as complete a possession as the subject matter will permit.

d 2 Vef. 434.

e Proc. in Chan.  
300. 2 Vef. 441.  
Vid. also 2 Vef.  
jun. 116.

f 2 Vef. 443.

g 3 Atk. 214.  
2 Vef. 441.  
4 Bro. Ch. Rep.  
72.

h 1 P. Wms.  
404. 3 P. Wms.  
356. 2 Bro. Ch.  
Rep. 612.

But bills of exchange, promissory notes, and checks on bankers, seem incapable of being the objects of such donation<sup>i</sup>. The delivery of these instruments is distinguishable from that of a bond, which is a specialty, and itself the foundation of the action, the destruction of which destroys the demand; whereas the bills and notes are only evidence of the contract<sup>k</sup>.

i 3 P. Wms.  
356. 2 Vef. 442.  
4 Bro. Ch. Rep.  
291.

k 2 Vef. 443.

Nor shall a delivery merely symbolical have such operation. As, where, on a deed of gift not to

take

take place till after the grantor's death, a sixpence was delivered by way of putting the grantee in possession; the ecclesiastical court held such delivery to be insufficient for the purpose, and pronounced for the instrument as a will<sup>1</sup>. So it was determined<sup>1</sup> in chancery, that the delivery of receipts for South Sea annuities was in like manner ineffectual, and that, to make it complete, there ought to have been a transfer of the stock<sup>m</sup>. Least of all shall such a donation be effectuated by parol, as, merely saying "I give," without any act to transfer the property<sup>n</sup>. Nor shall a present absolute gift be considered as of this denomination. To bring it within the class, it must be made to take effect only on the death of the donor<sup>2</sup>. Therefore, the gift of a check on a banker, "Pay to self or bearer two hundred pounds" and also of a promissory note, being absolute and immediate, was held clearly on that ground to be no *donatio mortis causa*<sup>p</sup>. But where the donor gave a bill on his banker, with an indorsement, expressing that it was for the donee's mourning, and giving directions respecting it, the bill was decided to be an appointment in the nature of such donation, since it was for a purpose necessarily supposing death<sup>q</sup>.

<sup>1</sup> 1 P. Wms. 441. et vid.  
<sup>2</sup> 2 Vef. jun. 119.

Simple contract debts, and arrears of rent, are incapable of this species of disposition, because there can be no delivery of them<sup>r</sup>.

<sup>r</sup> 2 Vef. 436, 442.

Whether



s Vid. 3 P.  
Wms. 358 in  
not. 2 Vef. 436.  
Ambl. 318.

Whether the delivery of a mortgage deed will amount to such gift of the money due on the security, is an undecided point.

s 11 Vin. Abr.  
172. 1 P. Wms.  
441 3 P. Wms.  
357.

2 Bl. Com.  
514 2 Vef. jun.  
120.

2 Bl. Com.  
514. 2 Vef. jun.  
120.

If the donor die, the interest of the donee is completely vested; nor is it necessary that the gift should be proved as part of the will; nor is the executor's assent to it requisite, as in the case of a legacy. But the gift, however regularly made, shall not prevail against creditors.

Such is the interest which the executor, the heir, the successor, the devisee, the remainder-man, the widow, and the donee *mortis causa* of the testator, respectively take in the personal effects,

## C H A P. VII.

HOW EFFECTS WHICH AN EXECUTOR TAKES IN  
THAT CHARACTER MAY BECOME HIS OWN.

THE property which an executor takes in his representative capacity may, in certain instances, be converted into his own. As, first, in regard to the ready money left by the testator. On its coming into the hands of the executor, the property in the specific coin must of necessity be altered; for when it is intermixed with the executor's own money, it is incapable of being distinguished from it, although he shall be accountable for its value; and therefore a creditor of the testator cannot by *feri facias* on a judgment recovered against the executor, take such money as *de bonis testatoris* in execution<sup>a</sup>. So, if the testator died indebted to the executor, or the executor not having ready money of the testator, or for any other good reason, shall pay a debt of the testator's with his own money, he may elect to take any specific chattel as a compensation; and if it be not more than adequate, the chattel by such election shall become his own<sup>b</sup>.

<sup>a</sup> Off. Ex. 89.  
Dy. 187. b.  
Plowd. 185.

But if the debt due to him from the testator amount to the full value of all his effects in the executor's hands, there is a complete transmutation of

c Plowd. 185.

of the property in favour of the executor, by the mere act, and operation of law: in the former case, his election, and in the latter, the mere operation of law, shall be equivalent to a judgment and execution, for he is incapable of suing himself.

d Off. Ex. 90.  
91.

So, in the case of a lease of the testator devolved on the executor, such profits only as exceed the yearly value shall, as it has been already stated, be held to be assets; it therefore follows, that if the executor pay the rent out of his own purse, the profits to the same amount shall be his. There are likewise other means of thus changing the property. As, if the testator's goods be sold under a *feri facias*, the executor, as well as any other person, may buy such goods of the sheriff; and in case he does so, the property, which was vested in him as executor, shall be turned into a property in *jure proprio*.

e Off. Ex. 91.

If the executor among the testator's goods find, and take some, which were not his, and the owner recover damages for them in an action of trespass or trover, in this, as in all similar cases, the goods shall become the trespasser's property, because he has paid for them.

f Off. Ex. 92.



## C H A P. VIII.

OF THE INTEREST OF ADMINISTRATOR, GENERAL  
AND SPECIAL—OF A MARRIED WOMAN, EXECUTRIX  
OR ADMINISTRATRIX—OF SEVERAL EXECUTORS OR  
ADMINISTRATORS—OF THE EXECUTOR OF AN EX-  
ECUTOR—OF AN ADMINISTRATOR DE BONIS NON—  
OF AN EXECUTOR DE SON TORT.

**A**S an administrator has the office and quality  
of an executor, the interest of the one in the  
property of the deceased, is in all respects the same  
as that of the other<sup>a</sup>. The interest of special or  
limited administrators is, also, during its conti-  
nuance, the same as that of an executor<sup>b</sup>; but  
they are not invested, as will be shewn in its pro-  
per place, with the same powers and authority as  
belong to him<sup>c</sup>.

Off. Ex. 159.  
Off. Ex. Suppl.  
48. 5 Co. 83.  
P. Wms. 43.  
2 Fonbl. 387.

c 11 Vin. Abr.  
104, 105.  
3 Bac. Abr. 13.  
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If a married woman be executrix, or administra-  
trix, the husband has a joint interest with her in the  
effects of the deceased; such as devolves the whole  
administration upon him, and enables him to act  
in it to all purposes, with or without her assent<sup>d</sup>.  
Therefore it is held, that he may surrender or dispose  
of a term, which was vested in her in that capacity,  
and such surrender, or disposition, shall be binding  
upon her<sup>e</sup>. So, a gift or release of any part of the  
deceased's personal property by the husband alone,  
shall

d Lord Raym.  
369. Com. Dig.  
Admon. D.  
1 Salk. 306.  
e Off. Ex. 199.  
4 Term Rep.  
617,  
Bl. Rep. 301.

f Salk. 117.  
Off. Ex. 208.

g Salk. 366.  
Off. Ex. 207.  
208. Com. Dig.  
Admon. D.  
vid. supra 64.

h Off. Ex. 208.  
Com. Dig.  
Baron & Feme.  
F. 1. Dy. 331.

i 2 Bl. Com.  
408. Off. Ex.  
190. 3 Bac.  
Abr. 10. Off.  
Ex. Suppl. 20.

k Off. Ex. 202. right<sup>r</sup>.

shall be equally available<sup>r</sup>; but the wife has no right to administer without the husband; and such acts, as have been just mentioned, if performed by her without his concurrence, will be of no validity<sup>r</sup>. In case of the husband's death, the interest, never having been divested, shall survive to her; but if she die, it shall not survive to the husband, inasmuch as it belonged to him merely in her right, as representative of the deceased<sup>r</sup>. And although, generally speaking, a feme covert cannot make a will without the assent of her husband, yet without his assent she may make a will, and continue the executorship in respect to the property thus vested in her in *auter droit*<sup>r</sup>. Hence, if the wife of A. have debts due to her in her own right, and is also executrix to B., and make a will without her husband's assent, appointing an executor, the will in respect to the goods and credits which belonged to her as the executrix of B., shall be valid, and her executor may prove it in opposition to the husband. But as to the debts due to her in her private capacity, the will shall be void, and the husband may take administration: she shall be considered as dying testate in regard to the property of which she was possessed as executrix, and as intestate in regard to that to which she was entitled in her own right<sup>r</sup>.

If there be several executors, or administrators, they are regarded in the light of an individual person. They have a joint and entire interest in the testator's effects, which is incapable of being divided;

ided'; and, in case of death, such interest shall vest in the survivor<sup>m</sup>.

1 Com. Dig.  
Admon. B. 12.  
Dy. 23. b.  
3 Bac Abr. 30.  
m 9 Co. 36.  
Dy. 160. vid.  
supra 16.

So also an executor of an executor, in however remote a series, has the same interest in the goods of the first testator, as the first and immediate executor<sup>n</sup>.

n Com. Dig.  
Admon. G.  
Off. Ex. 259.  
11 Vin. Abr.  
420. 4 Burn  
Eccl. L. 273.

An administrator *de bonis non*, has also the same interest in such of the effects as remain unadministered, as was vested in the executor, or antecedent administrator.

An executor *de son tort* has no interest whatever in the property, and therefore can maintain no action in right of the deceased<sup>o</sup>.

o 11 Vin. Abr.  
215. 12 Mod.  
471, 472.  
2 Bl. Com. 507.  
p 11 Vin. Abr.  
214—217.  
12 Mod. 471.  
472. Moore  
126. 2 Vent.  
179. 3 Bac Abr.  
25, 26. 3 Term  
Rep. 590.  
2 H. Bl. 26.

But if the executor *de son tort* take out administration, it shall to most purposes qualify the wrong, and vest the same interest in him as in other administrators, and consequently such as shall have relation to the time of the intestate's death<sup>p</sup>.

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## BOOK III.

## OF THE POWERS AND DUTIES OF EXECUTORS, AND ADMINISTRATORS.

## CHAPTER I.

## OF THE FUNERAL—OF MAKING AN INVENTORY—OF COLLECTING THE EFFECTS.

## SECTION I.

*Of the funeral.*

THE subject now leads me to consider the powers and duties of an executor, or administrator<sup>a</sup>.

<sup>a</sup> 2 Co. 136.

And, first, he is to bury the deceased according to his rank and circumstances<sup>b</sup>. It has been already stated, that an executor, before probate, may perform this pious office<sup>c</sup>; and that the performance of it by a stranger shall not constitute him an executor *de son tort*<sup>d</sup>. The expences attending it shall be allowed in preference to all debts, and charges<sup>e</sup>; but the executor is not justified in incurring such as are extravagant<sup>f</sup>. Nor as against creditors shall he be warranted in more than are absolutely necessary. In strictness, no funeral expences are allowed in the case of an insolvent estate, except

<sup>b</sup> Prec. Chan.

<sup>c</sup> 27 Com. Dig.

Admon. C.

<sup>c</sup> Supr. 24.

<sup>d</sup> Supr. 19.

<sup>e</sup> 11 Vin. Abr.

432. Br. tit.

Executor,

pl. 172. Dr. &

Stud. Dial. 2.

<sup>f</sup> c. 10.

<sup>f</sup> 2 Bl. Com.

508.

g Salk. 296.  
L. of Ni. Pr.  
143. 4 Burn  
Eccl. L. 301.  
Off. Ex. 174.  
3 Atk. 249.  
3 Bac. Abr. 85.  
h Off. Ex. 131.

i 2 Bl. Com.  
508. Godolph.  
p. 2. c. 26. f. 2.

k Vid. supra.  
22, 63.

except for the coffin, shroud, and ringing the bell; the fees of the person, clerk, sexton, and bearers; but not for the pall, or ornaments<sup>g</sup>. Still less shall charges for feasts and entertainments be admitted; and indeed in any case they seem incongruous to so mournful an occasion<sup>h</sup>. If the executor neglect the observance of these rules, he will be chargeable with a species of devastation or waste of the testator's property, which shall be prejudicial only to himself, and not to the creditors or legatees<sup>i</sup>.

The executor must also prove the will, or in case of intestacy, the next of kin must take out administration within the six months limited by the statute, provided they respectively act<sup>k</sup>.

## S E C T. II.

*Of the making of an inventory by the executor or administrator.*

a 4 Burn Eccl.  
L. 250.

AN executor, or administrator, before he administers, except by the performance of such acts which cannot be deferred, as disposing of perishable articles<sup>a</sup>, is likewise bound, pursuant to the stat. Hen. 8. c. 5. passed in affirmance of the ecclesiastical law, to make an inventory of the deceased's personal estate and effects, in the presence of at least two of his creditors, or legatees, or next of kin; and in their default, or absence, of two

oth



other honest persons; and the same shall cause to be indented, of which one part shall be delivered in to the ordinary upon oath, and the other part shall remain in the possession of such executor or administrator. And the ordinary shall not, under the penalty of ten pounds, refuse to take such inventory, when so presented to him<sup>b</sup>. Also, by the stat. <sup>b 3 Bac. Abr. 45. 4 Burn Eccl. L. 251.</sup> 22 & 23 Car. 2. c. 10. as hath been before mentioned<sup>c</sup>, an administrator must enter into a bond, with two or more sureties, conditioned, among other things, for his exhibiting into the registry of the court, at or before a day specified, a true and perfect inventory of the goods, chattels, and credits of the deceased come to his possession<sup>d</sup>. <sup>c Supr. 69. d 3 Bac. Abr. 46. 11 Vin. Abr. 358.</sup>

An inventory is thus required for the benefit of creditors and legatees, or parties in distribution<sup>e</sup>. It is to contain a full, true, and perfect description and estimate of all the chattels, real and personal, in possession, and in action, to which the executor or administrator is entitled in that character, as distinguished from the heir, the widow, and the donee *mortis causa* of the testator or intestate<sup>f</sup>. It must also distinguish such debts as are sperate, and those which are doubtful, or desperate<sup>g</sup>. By the executor, it must be exhibited within a competent time: what shall be so considered, depends on the discretion of the ordinary, regulated by the distance at which the goods lie from the residence of the executor, and other circumstances<sup>h</sup>. An administrator is bound, pursuant to the stat. of Car. 2. to exhibit his inventory before the ordinary by the <sup>e 3 Bac. Abr. 45. Swinh. p. 6. f. 6. f 2 Bl. Com. 510. 3 Bac. Abr. 47. 4 Burn Eccl. L. 253, 254. g 4 Burn Eccl. L. 254, 3 Bac. Abr. 47. L. of Ni. Pr. 140. h 3 Bac. Abr. 47. Swinh. p. 6. f. 8. 4 Burn Eccl. L. 265.</sup>

time specified in the condition of the bond, and  
 13 Bac. Abr. 47. must do so at his peril<sup>r</sup>.  
 Salk. 251.

k Com. Dig.  
 Admon. B. 7.  
 4 Burn Eccl. L.  
 250, 265. Sed  
 vid. 5 Mod. 247.

1 Stat. 21 Hen.  
 8. c. 5. Salk.  
 251.

m 4 Burn Eccl.  
 L. 252. 2 Vef.  
 193.

And the judge has authority to cite or summon  
 either of them for such a purpose, not only at the  
 suit of a party, but at his own discretion<sup>a</sup>.

In point of law, nevertheless, it is the duty, both  
 of an executor and administrator, of their own  
 accord<sup>1</sup>, to exhibit an inventory; the former, with-  
 in a reasonable time, the latter, at the time limited  
 by the condition of the administration-bond. And  
 the courts formerly considered the neglect of this  
 duty in a light unfavourable to the party, especi-  
 ally where there was a deficiency of assets; and  
 although not conclusive against him, yet as ex-  
 posing him to imputation; and that the omission  
 was the less to be excused, since neither at law  
 nor in equity is the inventory final; it is permit-  
 ted him to shew that the assets come to his hands  
 amount, from unforeseen circumstances, to less  
 than he may have originally stated them<sup>m</sup>. But  
 although such be the legal obligation imposed on  
 an executor or administrator, in every case, to  
 produce an inventory, yet the practice of the spi-  
 ritual court seems in this point to have been  
 gradually relaxing: at one period, it appear-  
 ed to have been usual for the executor or admini-  
 strator, after probate or administration, to exhi-  
 bit an inventory, which was considered as au-  
 thenticated by the general oath he had taken for  
 the due execution of the will, or administration of  
 the effects, and for exhibiting a true inventory.

Yet then he was liable to be called upon to exhibit a farther inventory on his special oath, at the suit of a party interested<sup>n</sup>. But according to the practice which at present prevails, neither the executor nor administrator, in general cases, exhibits any inventory whatsoever, unless he be cited for that purpose in the spiritual court, at the suit of a creditor, or legatee, or party in distribution<sup>o</sup>; and in that case, his former general oath will not be sufficient; but the inventory thus exhibited, must be verified by a special oath, either personally, or by virtue of a commission<sup>p</sup>.

<sup>n</sup> 4 Burn Eccl.  
L. 250, 265,  
266. 1 Ought.  
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<sup>o</sup> Ex. relat.

<sup>p</sup> 4 Burn. Eccl.  
L. 266.

It is, however, the part of a prudent person who sustains this office, in every case to see that the effects are carefully appraised, and reduced into an inventory, not only because he may be cited hereafter to produce it, but also, because a distinct and accurate knowledge of the fund is necessary, as will more clearly appear from the sequel of this work, to direct him in the safe execution of the trust. Indeed, if a party administer without making an inventory, the law will suppose him to have assets for the payment of all the debts and legacies, unless he rebut the presumption; whereas, if he make an inventory, he shall not be presumed to have more effects of the deceased than are comprised within it; and the proof of any omission is then thrown on the opposite party<sup>q</sup>.

<sup>q</sup> 4 Burn Eccl.  
L. 265, 266.

But it is not necessary, according to the modern practice, that the appraisement and inventory should



r 4 Burn Eccl.  
L. 265.

s 4 Burn Eccl.  
L. 265.

t Raym. 470.

u 4 Burn Eccl.  
L. 266.

should be made exactly pursuant to the letter of the statute. If the effects appear to have been appraised fairly, and by persons of repute, and reduced into an inventory, such inventory shall obtain credence, unless it be falsified by the adverse party; And an inventory may be dispensed with altogether, if it shall appear clearly to the court to be unnecessary. As, where A. died possessed of a large personal estate, and appointed his eldest son executor; and among other bequests, gave his second son two thousand pounds, to be paid at three several payments: The second son cited his elder brother before the judge of the prerogative court where the will was proved, in order to compel him to bring in an inventory: But it appearing that the two first payments had been made, and the third had been tendered, the judge decided, that there was no need of an inventory at the instance of the plaintiff; and the sentence was affirmed by the delegates, first on appeal, and afterwards on a commission of review.

On the other hand, the judge will, in special cases, at the instance of a party interested, decree an inventory to be exhibited by the executor or administrator, before the issuing of the probate, or letters of administration, under seal; and such inventory must also be substantiated by a special oath. Also, under particular circumstances, before the granting of the probate, or letters of administration, the court will, on the petition of a party interested, instead of requiring such inventory,

story, issue a commission for the appraisement, and valuation of the goods, rights, and credits, and inspection of the bonds, leases, and other writings, relative to the personal estate of the deceased, at his house, or elsewhere, on a day specified, with such continuation of time and place as may be necessary. <sup>v</sup>.

w 4 Burn Eccl.  
L. 266.

In cases of this nature, there also usually issues a monition to the other party in special, and to all others in general, with whom any of such effects of the deceased remain, requiring them to exhibit the same to the appraisers under such commission, at the time and place appointed for its execution, in order that they may be appraised, and inserted in the inventory <sup>x</sup>.

x 4 Burn Eccl.  
L. 266.

And on such commission being duly executed, the inventory shall be brought in, and exhibited, signed by the hands of the appraisers, or two of them at the least, but without the oath of the party <sup>y</sup>.

y 4 Burn Eccl.  
L. 267.

In such case, also, an inventory is often required on the executor's or administrator's oath, of such goods of the deceased as have been already disposed of <sup>z</sup>. But after an inventory is exhibited, a creditor cannot impeach it in the ecclesiastical court; for the stat. 21 Hen. 8. which requires an executor or administrator to make an inventory, enjoins him only to deliver it on oath into the keeping of the ordinary

z 4 Burn Eccl.  
L. 267.

a 4 Burn Eccl.  
L. 267. Burr.  
1922. 8 Mod.  
168. 2 Fonbl.  
418. not. (d).

ordinary; and the ordinary is bound to receive the same on its being so presented<sup>a</sup>.

Yet a creditor may state objections to the inventory, which the party is bound to answer upon oath; but no evidence is admissible to contradict the answer. If the creditor be still dissatisfied, he may have recourse to enquiry for more effectual relief<sup>b</sup>.

b 2 Fonbl. 418.  
not. (d).

### S E C T. III.

#### *Of his collecting the effects.*

THE next duty of the executor or administrator is to collect all the goods and chattels so inventoried. For that purpose, the law invests him with large powers and authority. As representative of deceased, we have seen, he has the same property in the effects as the principal had when living; he has also the same remedies to recover them<sup>a</sup>. Within a convenient time after the testator's death, or the grant of administration, he has a right to enter the house descended to the heir, in order to remove the goods<sup>b</sup>, provided he do so without violence; as, if the door be open, or at least the key be in the door; and, although the door of entrance into the hall and parlour be open, he cannot therefore justify forcing the door of any chamber

a 2 Bl. Com.  
310. Hargr.  
Co. Litt. 209.

b Vid sup. 24.



to take the goods contained in it; but is empowered to take those only, which are in such rooms as are unlocked, or in the door of which he shall find the key. He has, also, a right to take deeds and other writings, relative to the personal estate, out of a chest in the house, if it be unlocked, or the key be in it; but he has no right to break open even a chest. If he cannot take possession of the effects without force, he must desist, and resort to his action<sup>c</sup>. On the other hand, if the executor or administrator, on his part be remiss in removing the goods within a reasonable time, the heir may distrain them as damage feasant<sup>d</sup>.

<sup>c</sup> Off. Ex. 91,  
93. 11 Vin.  
Abr. 267.

<sup>d</sup> Off. Ex. 93.  
Plowd. 189,  
281.

The executor has also a right, on producing the probate at the bank, and causing so much of it as relates to the testator's interests in the several stocks to be entered in the proper offices, according to the acts of parliament which regulate this species of property, to have the same transferred from the testator's name into his own, or to such person as he shall appoint; and even in the case of a specific bequest of stock, the executor is entitled to call upon the bank for a transfer; and on their refusal, they are subject to an action at his suit. It is personal property, and subject to all its incidents<sup>e</sup>. The administrator has the same right on producing the letters of administration.

Vid stat. 5. W.  
& M. c. 20.

<sup>e</sup> The Bank of  
England v.  
Moffat. 3 Bro.  
Ch. Rep. 260.  
Vid. also  
Dougl. 524.

The executor or administrator has likewise authority to sell or dispose of the deceased's effects, and

f 2 Bl. Com.  
510. 11 Vin.  
Abr. 270.  
2 Vern. 445.

and convert them into ready money, to answer the purposes of the trust<sup>c</sup>.

He is entitled to recover by action, or other legal remedies, or by suit in equity, whatever pertains to such personal estate<sup>d</sup>.

He is also empowered to redeem such chattels as the deceased may have left in pledge<sup>e</sup>.

## C H A P. II.

## OF HIS PAYMENT OF DEBTS IN THEIR LEGAL ORDER.

## S E C T. I.

*Of debts due to the crown by record, or specialty—  
Of certain debts by particular statutes.*

THE disposition of the property when thus collected, and which constitutes assets, is next to be discussed. And, first, I shall treat of the application of the assets in the order prescribed by law. He must, in the first place, pay all funeral charges, and the expences of proving the will, or of taking out letters of administration <sup>a</sup>. Secondly, he must pay the debts of the deceased, and in such payment he must be careful to observe the rules of priority; or, if he pay those of a lower degree first, on a deficiency of assets, he must answer those of a higher out of his own estate <sup>b</sup>. The more clearly to trace the order which the law prescribes for the payment of debts, and which the executor or administrator is thus bound at his peril to observe, it is necessary to consider them under a variety of classes.

<sup>a</sup> 2 Bl. Com.  
511. Off. Ex.  
130, 131.

<sup>b</sup> 2 Bl. Com.  
511.

They are distinguished, then, first, into debts due to the crown, by record, or specialty: secondly, Certain debts created by particular statutes: thirdly,  
Debts



Debts of record in general : fourthly, Debts due by specialty : fifthly, Debts due by simple contract ; first, to the king ; and secondly, to a subject.

To all other debts of whatever nature, as well of a prior as of a subsequent date, such as are due to the crown, by record or specialty, claim the precedence <sup>c</sup>.

c 11 Vin. Abr.  
295. 3 Bac. Abr.  
79. Off. Ex.  
133. Cro. Eliz.  
793. Com. Dig.  
Admon. C. 2.  
3 Salk. 80.

Debts secured to the king by specialty, are of the same degree with those of record : for by the stat. 33 H. 8. c. 39. it is enacted, that all obligations, and specialties, taken to the use of the king, shall be of the same nature as a statute-staple <sup>d</sup>. The king, by his prerogative, is to be preferred before other creditors, inasmuch as the law regards the royal revenue as of more importance than any private interest <sup>e</sup>. Therefore, an executor, whose testator was indebted by matter of record to the king, may plead to an action brought by a judgment creditor, or any other creditor, that the testator died thus indebted to the crown, and hath no left assets more than to satisfy the same, and such plea shall be valid ; but the defendant must shew the record in certain <sup>f</sup>. So if the creditor proceed to sue out execution on a statute-merchant, or staple the executor on setting forth this matter, will be relieved on an *audita querela* <sup>g</sup>. But the debts due to the crown, which are so privileged, must be such as are due by matter of record, or by specialty which, as we have just seen, are of the same nature <sup>h</sup>. And, therefore, sums of money owing to

d Off. Ex. 134.

e 3 Bac. Abr.  
79. Off. Ex.  
133.

f Off. Ex. 134.  
Com. Dig.  
Admon. C. 2.

g 3 Bac. Abr.  
79. Off. Ex.  
133.

h 3 Bac. Abr.  
79. Off. Ex.  
133, 134.

the king on wood sales, sales of tin, or of other his minerals, for which no specialty is given, shall not be preferred to a debt due to a subject by matter of record. Hence, though fines and amercements in the king's courts of record are clearly debts of record, and entitled to such preference, yet amercements in the king's courts baron<sup>h</sup>, or courts of his honours, which are not of record, have no such priority; nor have fines for copyhold estates, nor money arising from the sale of estrays within his manors, or liberties: for these are not debts of record. So, whatever accrues to the king by attainder, or outlawry, is considered as a debt by simple contract before office found; and, although debts due to the person outlawed, or attainted, be by obligation, or other specialty, and the outlawry or attainder be of record, yet the law does not recognise the king's title before office found: for, till then, it does not appear by record that any such debt was due to the party<sup>l</sup>.

13 Fac. Abr.  
80. Off. Ex.  
134. Com. Dig.  
Admon. C. 2.

So, if the king's debtor by simple contract, be outlawed on mesne process, the debt is not altered in its nature, nor shall it have precedence, as if the outlawry be subsequent to the judgment, and the debt therefore of record<sup>k</sup>. Nor does the prerogative extend to a debt assigned to the king. Therefore it was held, where the obligee of a bond, after the death of the obligor, assigned it to the king, that the obligor's executors were warranted in satisfying a judgment recovered against him in his life-time in preference to the bond<sup>l</sup>. So, also, the arrears

1 Com. Dig.  
Admon. C. 2.  
1 Salk. 80.  
11 Vin. Abr.  
291.

1 Com. Dig.  
Admon. C. 2.  
11 Vin. Abr.  
301. Lane 65.

m 3 Bac. Abr.  
20. Off. Ex.  
133.

arrears of rent due to the crown, whether it be a fee-farm rent, or a rent reserved on a lease for years, shall, it seems, be regarded in the light of a debt by simple contract<sup>m</sup>.

Such is the law in regard to debts due to the crown, by record, or specialty.

n 3 Bac. Abr.  
80. in not.  
2 Bl. Com. 511.  
4 Burn Eccl.  
L. 301.

Next, in order, are certain specific debts, which subsequent to those of which I have been treating are, by particular statutes, to be preferred to all others, as forfeitures for not burying in woollen by 30 Car. 2. c. 3.: money due for letters to the post office, by 9. Ann. c. 10: and money due from the overseers of the poor, by 17 Geo. 2. c. 38.<sup>a</sup>

## S E C T. II.

*Of debts of record in general.—Of judgments: and herein of decrees.—Of statutes, and recognizances.—Of docketting judgments.*

TO these succeed debts of record in general of which there are two classes: first, judgments in courts of record: and, secondly, statutes and recognizances. The former are of a higher nature, and of a greater dignity, than the latter



for judgments are recovered on judicial proceedings in litigated cases, and in a regular course of justice; and the records of such judgments are entered on publick rolls, entrusted to the custody of a sworn officer; also judgments confessed by the testator, are on the same footing; for, though, in point of fact, they were voluntarily acknowledged, yet they, as well as other judgments, are presumed to have been given adversely, the law supposes, *quod judicium redditur in invitum* <sup>a</sup>.

<sup>a</sup> 3 Bac. Abr.  
80. Off. Ex.  
136, 139.  
Com. Dig.  
Admon. C. 2.  
Roll Abr. 9 6.  
Cro. Eliz. 793.

Hence judgments, as well such as were recovered against the testator, as those which were confessed by him, are in a precedent degree to statutes and recognizances; for statutes and recognizances, (of the nature of which I shall more fully speak), are entered into by the consent of the parties; the former, and, till enrolment, the latter, are carried in pockets, or deposited in escritoirs, in short, are in the private keeping of the creditor himself. Nor does priority of date make any difference in favour of such last mentioned securities <sup>b</sup>. An executor is obliged to discharge a later judgment, in preference to a statute or recognizance, prior in point of time <sup>c</sup>.

<sup>b</sup> 4 Co. 60.  
5 Co. 28, Off.  
Ex. 137. Hob.  
195. 11 Vin.  
Abr. 292. in  
not. 299. 2 Bl.  
Com. 160, 341.

<sup>c</sup> Off. Ex. 137.  
Com. Dig.  
Admon. C. 2.  
4 Co. 59, 60.

Such is the preference to which judgments, as distinguished from the more private records, are entitled. Nor is this privilege confined to judgments in the courts of Westminster-hall, but extends itself to judgments in all other courts of record; that is to say, courts in cities, or towns corporate,

corporate, having power, by charter or prescription, to hold plea of debt above forty shillings, as, in London, Oxford, and other places: for, although, in the first instance, such goods only can be taken in execution on those judgments as lie within the jurisdiction of those respective courts; yet, formerly, if the record were removed into the chancery, by *certiorari*, and thence, by *mittimus*, into one of the superior courts of law, execution might have been had upon the defendant's goods in any county in England<sup>d</sup>; and now, by the stat. 19 Geo. 3. c. 70., any of his majesty's courts of record at Westminster, may, on proper application, cause the records of such judgments to be removed thither, and may issue writs of execution against the persons or effects of the defendants, in the same manner as on judgments obtained in those superior courts. So a judgment in a *pie poudre* court, which is a court of record, incident to every fair and market, and is the lowest court of justice<sup>e</sup>, known to the law of England, claims the same preference<sup>f</sup>; and, by the above statute, its process, after judgment, shall be aided in the same manner. Nor does the priority of a judgment, in any degree, depend on the original cause of action; a judgment against the testator on a debt by simple contract, is of the same nature as a judgment on a specialty<sup>g</sup>. So, if the testator were bound in a recognizance, on which a *scire facias* was brought, and judgment given against him in his life-time, although this judgment be not *quod recuperet*, as in case of action

<sup>d</sup> Off. Ex. 139.

<sup>e</sup> 3 Bl. Com. 32.

<sup>f</sup> 11 Vin. Abr. 297. 2 Vern. 89.

<sup>g</sup> Vid. 2 Bl. Com. 158. 11 Vin. Abr. 299. Com. Dig. Admon. C. 2. Fitzg. 76.

on debt, but *quod habeat executionem*, yet, since execution is the fruit and effect of all judgments, this is, in substance, of the same nature, and may well be classed as a debt by judgment<sup>a</sup>.

2 Off. Ex. 139.  
Com. Dig.  
Admon. C. 2.  
Vid. also Yelv.  
133.

Nor, as between one judgment and another, is priority of time material. The judgment creditor, who first sues out a *scire facias*, must be preferred; but, before such writ be sued out, the executor has it in his election, where there are two judgment creditors, to pay which of them he pleases first; and, if each bring a *scire facias* on his judgment, yet the executor may confess either action, at his option, and that, although the *scire facias* were brought by the one creditor before the other<sup>b</sup>. So, where after verdict for the plaintiff in *assumpsit*, and before the day in bank, the defendant died, and judgment was entered the next term, pursuant to the stat. 17 Car. 2. c. 8. on *scire facias* brought against the executor, it was held, that the judgment should by relation be regarded as given in the life time of the testator, and be payable accordingly<sup>c</sup>. But where the defendant in an action on simple contract, after an interlocutory judgment, died, and on *scire facias* against his administrator, a writ of inquiry issued, and damages assessed, judgment was entered up against the intestate; the court inclined to the opinion, that the judgment pursuant to the stat. 8 & 9 W. 3. c. 11. ought to have been entered up, not against the intestate himself, but against his representative; and was therefore not pleadable by the administrator

2 Off. Ex. 138.  
11 Vin. Abr.  
499, 301.

1 Com. Dig.  
Admon. C. 2.  
11 Vin. Abr.  
302. 1 Lev.  
277. 1 Mod.  
6. S. C.



111 Vin. Abr.  
279. 1 Salk. 42.  
Com. Dig.  
Pleader. 2D. 9.

m 1 Will. 243.

to an action brought against him on a bond<sup>1</sup>. In like manner, where a defendant died after a writ of enquiry *executed*, and before the return of it, it was adjudged that a *scire facias* lay against his executor, to shew cause why the damages assessed should not be recovered<sup>2</sup>; nor in such case shall the judgment, if on simple contract, be preferred to a debt by specialty.

1 Braguer v.  
Langmead,  
7 Term Rep.  
20.

6 Term Rep.  
368. Vid. also  
7 Term Rep.  
24.

3 Bac. Abr.  
21. Off. Ex.  
137.

11 Vin. Abr.  
297. in not.  
2 Freem. 103.  
Vid. L. of Ni.  
Pr. 127.

11 Vin. Abr.  
291. 2 Fonbl.  
406. 1 Vern.  
340. Dougl. 1.

A judgment signed at any time during the term, or the vacation immediately subsequent, relates back to the first day of the term, although the defendant died before the judgment was actually signed; and an execution, tested the first day of the term, may be taken out upon it against his goods<sup>3</sup>. But, if the writ of execution be not tested till after the defendant's death, it is irregular, and, in such case, it is necessary to revive the judgment by *scire facias* against his representatives<sup>4</sup>.

If a judgment be kept on foot merely to defraud other creditors, or, if there be any defence of it in force, such judgment shall not avail to preclude them from their debts<sup>5</sup>.

A judgment *quod computet*, in the obsolete action of account, is of a nature too incomplete to be privileged like other judgments<sup>6</sup>.

A judgment in a foreign country is regarded, in our courts, merely as a debt by simple contract<sup>7</sup>.

Nor, as we have just seen, are judgments against an executor comprehended within the same class as those which are recovered against the testator<sup>a</sup>. <sup>2 Off. Ex. 138.</sup>

In case a *scire facias* be brought on a judgment after the executor has exhausted the assets in the discharge of such of the king's debts as are above-mentioned, or in the satisfaction of other judgments, the defendant may plead generally, that he hath fully administered; and on that plea he may give evidence of those facts, and that will be a sufficient defence<sup>b</sup>. But if an action be brought against an executor on a specialty, or other debt of an inferior nature, and a judgment against the testator remains unsatisfied, it must be pleaded specially<sup>c</sup>. <sup>7 Off. Ex. 138. vid. also 6 Term Rep. 388. Sed. vid. 3 Bac Abr. 80. & in not. 2 Ld. Raym. 678. Salk. 311. 2 Sauth. 50.</sup>

It is held, that an executor by bringing a writ of error on a judgment, may postpone it to a statute, and the satisfaction of the debt on the statute, pending the writ of error, shall be no *devastavit*, because it was out of his power to withstand the payment of it. The effect of the judgment is by the writ of error totally suspended<sup>d</sup>. <sup>2 11 Vin. Abr. 292. in not. ibid. 298, 299. in not. Cro. Eliz. 822. L. of Ni. Pr. 142. Yelv. 29.</sup>

But, if no writ of error be brought on the judgment, and a creditor by statute take out execution, the executor is bound to avail himself of his remedy by *audita querela*; in order to secure a fund for the satisfaction of the judgment<sup>e</sup>: and some authorities maintain, that though a writ of error be brought on the judgment, if he fail to resort to an *audita* <sup>6 Off. Ex. 137.</sup>

c Off. Ex. 137. *audita querela*, and suffer the statute to be execut-  
in not. vid.  
Cro. Eliz. 822. ed, it will be a *devastavit* \*.

d 2 Bl. Com.  
497.

e Hickey v.  
Hayter admin-  
istratrix,  
6 Term Rep.  
384.

f Per Lord  
Kenyon C. J.  
ibid.

g 6 Term Rep.  
387, 388.

h Steel v. Roke,  
1 Bos. & Pull.  
307.

i 3 Bac. Abr. 83  
in not Cro  
Eliz 793. vid.  
3 Mod. 115.  
11 Vin. Abr.  
274, 291.

k 11 Vin. Abr.  
294. 3 P. Wms.  
117. Off. Ex.  
139.

Nor is an executor bound to take notice of judgments in the courts of king's bench, common pleas, and exchequer, unless they are docketted; that is, abstracted and entered in a book, pursuant to the stat. of 4 & 5 W. & M. c. 20<sup>d</sup>. According to the true construction of that act, a judgment not docketted is put on a level with simple contract debts \*. If the executor have notice of the judgment, although not docketted, he may perhaps be warranted in giving it a preference as a judgment, but if he in that case pay other debts first, he is clearly not liable as on a *devastavit*; thus, to charge him, it seems that no other than the prescribed notice would be sufficient \*. And a plea of *plene administravit* to an action brought on such a judgment, will be supported by evidence of payment of debts by specialty, or by simple contract \*.

On the same principle, a judgment not docketted according to the directions of the statute, cannot be pleaded to an action on simple contract \*.

But of such judgments when docketted, an executor shall be presumed to have cognizance \*.

The provisions of the statute do not extend to judgments in inferior courts of record, yet the executor is bound to take notice of them at his peril \*.

A decree



A decree in a court of equity is, in respect to the course of administering assets, equivalent to a judgment at law, and shall stand in the same order of payment<sup>1</sup>.

In general, actual and express notice of a decree is necessary to make it binding on purchasers. Notice by implication, in respect to them, is effectual only where a suit is depending. It never was the doctrine, that a decree, after a cause is ended, shall be constructive notice to purchasers; but it is the pendency of a suit that creates such notice in their case, on the ground, that a suit is a transaction in a sovereign court of justice, and every man is presumed to be attentive to what passes there<sup>2</sup>, and, also, on the policy of preventing the transfer of rights in litigation. But an executor shall be affected with implied notice of a decree obtained against the testator; therefore, where an executor paid a debt due by specialty, before a debt due by a decree, of which he had no actual notice, he was decreed to pay it over again out of his own estate<sup>3</sup>.

1 11 Vin Abr.  
301. 3 Bac.  
Abr. 81. 3 Lev.  
355. 1 Vel. 496.  
2 P. Wms. 621.  
3 P. Wms. 401.  
not. (F.) Ca.  
Temp. Talb.  
217. 4 Bro.  
P. C. 287. See  
also 1 Fonbl.  
418. not. (8.)

m 2 Fonbl. 156.  
not. (n.) 2 P.  
Wms. 482.  
2 Ark. 174.  
3 Ark. 392.  
Ambl. 676.

23 Bac Abr. 81.  
2 Vern. 37, 82.  
2 P. Wms. 483.

11 Vin. Abr.  
291. Freem.  
Rep 333, 334.

3 P. Wms.  
401. not (F.)  
1 Vern. 143.

Although an executor cannot plead, or give in evidence at law<sup>4</sup> a decree of a court of equity, yet he shall be protected, and indemnified in paying due obedience to such decree, and all legal proceedings against him shall be stayed by injunction<sup>5</sup>.

But if the decree be not conclusive of the matters in question, as if it be merely to account, and does

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does not ascertain the sum to be paid, it is analogous to a judgment *quod computet* at law; and there is no complete judgment till the account be stated. Therefore, it has been holden, that, pending a bill in equity, and after such decree, an executor may pay any other debt of a higher, or an equal nature, in case the assets be legal, although he has no power of so doing as against a final decree.

9 2 Ask. 385.  
3 Ask. 392.  
6 Balk. 507.  
11 Vin. Abr.  
297. 3 Bac.  
Abr. 83.

Next in rank to judgments, are recognizances

1 Off. Ex. 140.  
2 Bl. Com. 511.  
Com. Dig.  
Admon. C. 2.  
Cro. Jac. 9, 35.

and statutes.

A recognizance is an obligation of record; it may be entered into by the party before a court of record, or magistrate duly authorised, conditioned for the performance of a particular act; as to appear at the assizes, to keep the peace, to pay a debt, or the like. A recognizance is in most respects like another bond. The chief distinction between them is, that the latter is the creation of a new debt, or an obligation *de novo*; the former is an acknowledgment on record of a prior debt, of which the form is: "That A. B. doth acknowledge to owe to our lord the king, to the plaintiff, to C. D. or the like, the sum of ten pounds," with condition to be void on performance of the thing stipulated. And in such case, the king, the plaintiff, or C. D. is called the cognizee, as he that enters into the recognizance is called the cognizor. This instrument being either certified to, or taken by, the officer of some court, is authenticated only by the record of such court, and not by the party's seal.

2 Bl. Com.  
341.

Of securities by statute there are three species : statutes merchant, statutes staple, and recognizances in the nature of statutes staple ; and, though they are fallen into disuse, yet, as they are frequently alluded to in argument, especially on this subject, it seems necessary to give some explanation of them \*. In order to form a distinct notion of their nature, we must recur to different acts of parliament.

u Vid 2 Bl.  
Com. 160.  
2 Reeve's Hist.  
Eng. L. 160.  
393. 4 Reeve's  
Hist. Eng. L.  
253, 254. Sall.  
Lect. 155, 156.

By stat. 13 E. 1. called the statute *de mercatoribus*, a merchant is empowered to cause his debtor to appear before the mayor of London, or before some chief warden of a city, or of any other town which the king shall appoint, or before other sufficient men, chosen and sworn thereto, when the mayor or chief warden cannot attend, or before one of the clerks, to be appointed by the king, and acknowledge the debt, and the day of payment. And the recognizance, that is, such acknowledgment, shall be duly entered by a clerk on a double roll, of which one part shall remain with the mayor, or chief warden, and the other be deposited with the clerks ; one of whom, with his own hand, shall write an obligation, to which writing the seal of the debtor shall be affixed, with the king's seal, provided for that purpose ; which seal shall be of two pieces, of which the greater piece shall remain in the custody of the mayor, or the chief warden, and the other piece in the keeping of such clerk ; and, if the debtor do not pay at the day limited, the merchant shall again appear before the mayor, and



and clerk, with his obligation; and, if it be found by the roll or writing, that the debt was acknowledged, and the day of payment expired, then the statute prescribes certain steps to be taken for the recovery of the debt. This obligation is called a statute merchant.

In regard to the kind of statutes secondly above-mentioned, the staple, that is to say, the grand mart for the principal commodities and manufactures of England, was, by the stat. 27 E. 3. held in certain trading towns. And, in order that contracts made within the same might be more effectually enforced, that act directs a course similar to a statute merchant, and enacts, that every mayor of the staple shall have power to take recognizances of debts arising on such contracts, in the presence of the constables of the staple, or of one of them; and, that in every staple there shall be a seal remaining in the custody of the mayor, under the seals of the constables; and all obligations which shall be made on such recognizances, shall be sealed with that seal. Such obligation is denominated a statute staple.

The benefit of this mercantile transaction is extended to all the king's subjects in general, by virtue of the stat. 23 H. 8. c. 6. by which it is enacted, that the chief justice of the king's bench, and the chief justice of the common pleas, and in their absence, out of term, the mayor of the staple of Westminster, and the recorder of the city of London,

don, jointly, shall have full power and authority to take recognizances or acknowledgments of the king's subjects for the payment of debts, according to a form specified; and that every obligation so acknowledged shall be sealed with the seal of the cognizor, and also with such seal as the king shall appoint for the same, and with the seal of one of such justices, and be subscribed by him, or with the seals of such mayor and recorder, with their names subscribed. The statute then directs, that such recognizance shall be duly inrolled in a manner similar to the statute merchant, and provides, that in default of payment of the debt contained in such obligation, the cognizee shall have the same advantages in every respect, as in the case of an obligation by statute staple. The obligation pursuant to this act is styled, a recognizance in the nature of a statute staple.

Such are the three species of statutes.

Although recognizances are entered on the rolls of the king's courts, while statutes are consigned to the custody of the party (and hence are called pocket records'), yet both species of securities <sup>15 Co. 28, b.</sup> having been entered into voluntarily, and privately, are regarded as equal in their nature, and payable in the same order. Nor is it material in regard <sup>11 Off. Ex. 140.</sup> to the payment by the executor, which of them are prior, or subsequent in point of date. Therefore, where there are many cognizees, he may prefer a subsequent to a prior statute, or recognizance, for they

they all equally affect the personal estate; although, as to lands, the first in point of time shall have the preference<sup>w</sup>.

<sup>w</sup> Off. Ex. 140.  
3 Bac. Abr. 81.  
Roll. Abr. 925.  
Com. Dig.  
Admon. C. 2.

If the statute or recognizance be defeasanced for the payment of a sum of money at a day certain, although the day be not arrived, yet it is a debt of the same class with other statutes; for it is a present, and immediate duty, to be discharged at a future period<sup>x</sup>. So, where a testator acknowledged a recognizance in the nature of a statute staple, of which the defeazance, after reciting, that the testator, and cognizee as his surety, were bound in an obligation to J. S. for the debt of the testator, with a condition for payment of one hundred pounds at a future day, provided, that, if the testator, his executors, or assigns, should pay the one hundred pounds to J. S. at the day, the statute should be void; it was held, that although the day of payment were not yet come, and it were a collateral sum to be paid to a stranger to the statute, and not to the cognizee, and therefore no duty to him, and although the heir of the testator might possibly pay the money at the day, yet, inasmuch as the statute was for the payment of a certain sum of money with which by intendment the executor would be charged, he might, although before the day of payment, plead this statute in bar to an action of debt on a bond<sup>y</sup>. But, if the testator in his lifetime enter into a statute for performance of covenants and none of them are broken, to an action of debt on specialty, the executor cannot plead this statute

<sup>x</sup> 11 Vin. Abr.  
286. 1 Roll.  
Rep. 405.  
Vaugh. 103.

<sup>y</sup> 11 Vin. Abr.  
286. Cro. Car.  
362.



for, perhaps, the covenants may never be broken, and it would be unreasonable to allow him to elude a just debt on a contingency which may never happen<sup>z</sup>. So, if it be for payment of money when an infant shall come of age, it shall be no bar to other debts, for the infant may die before that time<sup>a</sup>.

<sup>z</sup> 3 Bac. Abr. 81. 5 Co. 28.

<sup>a</sup> Roll. Abr. 925.

If a statute be joint and several, the cognizee may elect to sue either the surviving cognizor, or the executor of him who is dead, or both, in separate actions. If it be joint only, the survivor alone is liable<sup>b</sup>.

<sup>b</sup> 11 Vin. Abr. 288. 1 Mod. 165.

The remedy on a statute is more expeditious than on a recognizance; since execution may be taken out on a statute without a *scire facias*, or other suit. But in case of a recognizance, if a year pass after the acknowledgment, no execution can be sued out against the party without a *scire facias*, and, in case of his death, although a year be not elapsed, yet a *scire facias* must be sued out against his executor<sup>c</sup>.

<sup>c</sup> Off. Ez. 140.

If a *scire facias* be sued out on a recognizance, an executor shall not defeat it by a voluntary payment of a debt by statute; but, if, before judgment on the *scire facias*, execution be sued out against him on the statute, it shall prevail<sup>d</sup>.

<sup>d</sup> Off. Ez. 140. in not. 11 Vin. Abr. 299.

<sup>z</sup> Anderson, 157. pl. 87.

<sup>e</sup> 1 P. Wms. 334. 2 Vera. 750. S. C.

A recognizance not enrolled shall be considered as a bond, and payable accordingly<sup>e</sup>.

So

So a statute not regularly taken, may be good  
as an obligation \*.

eCro Eliz. 355.

461. 544.

2 Roll. Abr.

149.

Nor are other inferior debts of record to be forgotten; as issues forfeited, fines imposed by the judges at Westminster, or at the assizes, by the justices at quarter sessions, by commissioners of sewers, or of bankrupts, or by stewards of lectures and the like; for all these are debts of record and so payable by the executor<sup>1</sup>. Of all of which as well as of those by recognizance or statute, he is bound to take notice at his peril<sup>2</sup>.

f 11 Vin. Abr.

278. Off. Ex.

118.

g Vid. 2 Vern.

750.

### S E C T III.

*Of debts by specialty,—and herein of rent:—of debts by simple contract.*

THE class of debts next in succession are debts by special contracts; as for rent, and also on bonds, covenants, and other instruments under the seal of the party.

Although in regard to rent, the lessor has a remedy often more efficacious in his own hands, by distraining; yet, between a debt by obligation, and a debt by covenant for a sum certain, or for damages on a breach of covenant, and a debt for rent, there is no distinction of rank, they are all debts.

debts of the same degree<sup>1</sup>. Nor does it make any difference whether the rent be reserved by lease, in writing, or by parol: for in the latter case, the rent arises equally from the profits of the land, and is regarded as a debt by specialty. Nor is the nature of the debt changed by the determination of the lease: the contract remains in the realty, although the right of distress be gone<sup>2</sup>.

1 Off. Ex. 146.  
2 Bl. Com. 512.  
Com. Dig.  
Admon. C. 2.  
3 Burr. 1384.  
See also 1 Salk.  
326.

But it is necessary to consider rent as distinguished into such as hath been left in arrear by the testator, and such as hath accrued due subsequent to his death.

k 3 Bac. Abr.  
82. 96. 3 Lev.  
267. 2 Ventr.  
184 Com. Rep.  
67. 145. Comb.  
183. 11 Vin.  
Abr. 189. in  
not. Vid. 3 Bl.  
Com. II Stat.  
8 Ann. c. 14.

For rent, which was in arrear in the testator's life-time, the executor is liable merely in that character; as the testator's debt he can be sued for it in the *detinet* only, and to such action may plead, that he has fully administered<sup>1</sup>: Whereas, for the subsequent rent, the executor is in general regarded as personally responsible. He has no right, as we have already seen<sup>2</sup>, to waive the term, for he must renounce the executorship in toto, or not at all; and if he enter on the demised premises, as by his office he is bound to do, the lessor may charge him as assignee in the *debit*, and *detinet* for the rent incurred subsequent to his entry<sup>3</sup>.

1 Wilf. 4.  
Com. Dig.  
Admon. B. 14.

m Supr. 109.

n 1 Salk. 297.  
317. Off. Ex.  
147.

If the profits of the land exceed the amount of the rent, as the law *prima facie* supposes, such of the profits as are sufficient to make up the rent, shall be appropriated to the payment of the lessor, and cannot



cannot be applied to any other purpose. Therefore, if in such case the lessor bring an action against the executor for the rent, he cannot plead *plene administravit*, for that plea would confess a misapplication of the profits; since no other payment out of them can be justified till the rent be answered. On the other hand, the profits of the land may be inadequate to the rent. In a variety of cases, they may be easily supposed insufficient for a given period, although the lease may on the whole be beneficial. As in respect to rent for the occupation of premises from Michaelmas to Lady Day, especially where almost the whole profit is taken in the summer; as in the case of a lease of tithes, or of meadow grounds, which are usually flooded in the winter. So the profits for a series of years may be less than the amount of the rent, although the lease for the whole term may be of no small value; as in the case of a lease of woods, which are felleable only once in eight or nine years, and the selling has been very recent. In these, and the like instances, the executor is personally liable only to the extent of the profits, and for such proportion of the rent as shall exceed the profits, is chargeable merely in the capacity of executor, or, in other words, as far only as he has assets; and, in such case, to an action brought by the lessor against him in the *debet*, and *detinet*, he must disclose the matter by special pleading, and pray judgment whether he shall be charged otherwise than in the *detinet* only, for more than the actual profits.

1 Salk. 317.

Off. Ex. 149.

Off. Ex. 149.

1 Salk. 317.

Thus the profits of the land are to be applied by the executor, in the first place, to the discharge of the rent, and, if that fund should prove insufficient, the residue of the rent is payable out of the general assets, and stands on the same footing with other debts by specialty.

Debts by bond, and other instruments under the seal of the party, are of the same class with debts for rent; and an executor is bound to pay a debt by specialty before a debt by simple contract, although the bond be not yet due. For the obligation is a present duty, and the condition is but a defeasance of it. Hence it hath been adjudged, that if an action be brought against an executor on a simple contract of the testator, he may plead that his testator entered into a bond payable at a future day, and it shall cover assets to the amount of the sum payable by the condition. But if the testator be indebted to A. in one specialty, and to B. in another, and of A.'s debt the day of payment is to come, the executor has no right to pay B. in preference to A.: Yet if A. forbear to demand or sue for his debt, till the debt of B. become payable, then it is in the election of the executor to pay which of them he thinks proper. By the custom of London, if a citizen of London die indebted by simple contract, such debt is equal to a debt by specialty, and the payment of it by the executor shall be binding on the obligor of a bond, though a stranger, and no citizen.

Off. Ex. 146.

11 Vin. Abr. 304. Leon. 187.

3 Bac. Abr. 81. Cro. Eliz. 315. 3 Lev. 57. Cro. Car. 362. Ca. Temp. Hard. 228.

Off. Ex. 143. Com. Dig. Admon. C. 2.

3 Bac. Abr. 81. Cro. Eliz. 409. Noy, 53. Roll. Abr. 557.

In 5 Co. 82. b. 83.

In the administration of assets, a contingent security, as for example, a bond to save harmless, shall not stand in the way of a debt by simple contract. And, if subsequent to the payment of the simple contract debt the contingency should happen, it seems reasonable that evidence of such payment should be admitted on the executor's plea of *plene administravit*, to an action by the specialty creditor.<sup>2</sup>

7 II Vin. Abr.  
305. 2 Vern.  
101.

2 II Vin. Abr.  
307. Allen, 40.  
Sed vide  
Goldsb. 142.

But where the contingency has taken place, although the debt consequent upon it has not yet been paid, it may be pleaded to an action by a simple contract creditor. As where the testator had executed a bond to A. in two thousand eight hundred pounds, conditioned to indemnify him against another bond for eight hundred pounds which he had executed jointly with the testator to B. for the debt of the testator, in whose life time the eight hundred pounds had become due, and were still unpaid; on the executrix's disclosing these facts in a plea to an action of *assumpsit*, and stating that she had administered all, except so much as would satisfy such indemnity bond, it

<sup>a</sup> Cox v Joseph, was held to be a sufficient defence.<sup>3</sup>  
5 Term Rep.  
397.

A bond merely voluntary, shall be postponed to simple contract debts which are *bonâ fide* owing; but such bond, if not to the prejudice of creditors, must be paid to the executor, and in preference to legacies. For a bond, however voluntary transfers a right in the life-time of the obligor where



whereas legacies arise from the will, which takes effect only from the testator's death, and therefore they ought to be postponed to a right created in his life-time<sup>b</sup>. But an executor has no authority to pay a bond founded on an usurious contract, or a bond *ex turpi causa*. Such payment will amount to a *devastavit*, as well against legatees as against creditors<sup>c</sup>.

b 11 Vin. Abr. 304, 305. 1 Eq. Ca. Abr. 84.  
143. 3 Bac. Abr. 81, 82.  
Ca. Temp. Talbot. 156.  
3 P. Wms. 182.  
221. 339 Fin. Rep. 232.

If there be a joint and several obligation, an executor of a deceased obligor may pay the debt out of the estate of the testator, and plead it to other actions by creditors on specialties. But if the obligation be joint only, there the survivor must be charged out of his own estate, and the executors of the deceased obligor are not liable on the instrument<sup>d</sup>.

c 11 Vin. Abr. 307. Brownl. 33. Hob. 167.  
1 Vef. 254.

d 11 Vin. Abr. 288. 1 Mod. 165. Freeman. Rep. 127.

A demand arising from a covenant, as I have before observed, is of the same nature, whether it be for a specific sum, or whether it sound merely in damages<sup>e</sup>. Thus the grantor's covenant in a marriage settlement for him and his heirs, that the premises are free from incumbrances, shall rank equally with debts on bond<sup>f</sup>. So, to an action on a simple contract against an executor, he may plead that the testator entered into certain covenants, and may shew the breach of them, and state the amount of the damages incurred, and that he has assets more than to satisfy them: The plea will be good, although the damages are not liquidated<sup>g</sup>. And where the husband by marriage-articles having

e 3 Burr. 1380.

f 3 Bac. Abr. 81. 11 Vin. Abr. 292.

g 11 Vin. Abr. 305. 6 Mod. 144.

Q

agreed

agreed to settle one thousand five hundred pounds *per annum* on the issue, made a deficient settlement, and devised all his unsettled estates for payment of debts, it was adjudged in equity, that as the settlement was of less than the stipulated value the widow and infant were to be compensated in damages; but that as the articles made no mention of any specific land, nor contained any covenant in regard to its value, they were to come in after creditors by bond<sup>n</sup>.

11 Vin. Abr.  
290. 305.  
2 Vern. 172.

1 Cro. Eliz.  
232. Sheph.  
Epi. 990.

11 Vin. Abr.  
276 Cro. Eliz.  
232. vid. Co.  
Litt. 386.

1 Vid. 3 Burr.  
1383, 1384.

2 Bl. Com.  
511. Off. Ex.  
155.

3 Bac. Abr.  
20. in not.

If A. covenant to pay a sum of money, and die before payment, it may be recovered against his executors<sup>1</sup>: Whereas it has been held, that if he covenant that his executors shall pay the money, no action can be maintained against them, on the principle, that it could not be a debt of the executor, where it was not a debt of the testator<sup>2</sup>; but this latter case is of very doubtful authority, for there also the testator was himself bound, and the lien falls upon his representatives, though he himself could not have been sued; and it seems that on either covenant they are equally responsible<sup>3</sup>.

Last in the order of payment, are debts on simple contract; as on bills and notes not under seal, and verbal promises<sup>4</sup>. On contracts of this nature debts due to the king shall, it seems, be satisfied before debts which are due to subjects<sup>5</sup>; the wages also of domestic servants, and of labourers, appear with great reason entitled to a preference; but, with the exception of these, the executor has a right likewise

likewise in this species of debts, to prefer in payment whichever he pleases.

7 2 Bl. Com.  
511. 1 Roll.  
Abr. 927. 11  
Vin. Abr. 274.  
in not. Sheph.  
Epit. 986.

S E C T. IV.

*Of a creditor's gaining priority by legal, or equitable process.—Of notice to an executor of debts by specialty, or simple contract.*

SUCH is the order which the law prescribes to an executor for the payment of debts; and, although he has a right to pay one creditor in preference to another of the same degree, yet this election may be controlled by legal or equitable proceedings against him, of which he has due notice. Thus, if an action be properly commenced against an executor for any specific debt, it must be preferred by him in payment to others of the same class. Nor, in that case, shall he be warranted in making any voluntary payment of such other debts, to defeat the party of his remedy.

a Off. Ex. 145.  
b 11 Vin. Abr.  
296. in not.  
2 Vern. 300.  
2 Fonbl. 412.  
Com. Dig.  
Admon. C. 2.  
3 Fac. Abr. 83.  
2 Chan. Ca.  
201 2 Vern. 62.  
Off. Ex. 143.  
146.

Yet, although one creditor commence an action, and another creditor, in equal degree, commence a subsequent action, and first recover judgment, he must be first satisfied. Hence, an executor has it in his election to give a preference, by confessing judgment in the action of the one, and leading such judgment to the action of the other. But if, for the purpose of favouring the

c Off. Ex. 145.  
11 Vin. Abr.  
296. in not.  
302. 1 Lev.  
200. 1 P. Wms.  
295. Carter  
228. 2 Vern.  
300. 2 Fonbl.  
411, 412.  
5 Term Rep.  
238, 239.



claim of one plaintiff in prejudice to that of another, he plead a matter, which he knows to be false, the plea shall not be available, as it shall be, if the falsity exist not in his own knowledge, as if he plead *non est factum testatoris* <sup>d</sup>.

d 11 Vin Abr.  
296. 2 Chan.  
Ca. 201.  
2 Vern. 62.

And, even, after an interlocutory judgment and before the execution of a writ of enquiry of damages, he may confess a judgment in an action for a debt of equal degree<sup>e</sup>; for he is, in no case bound against his will to defend a suit, and expend the assets in costs, where the case is clear<sup>f</sup>.

e 2 Atk. 386.

f Off. Ex 145.

g 2 Fonbl. 413.  
not. s. Prec.  
Chan. 79. 188.  
1 Vern. 369.  
3 Bac. Abr. 81.

According to several adjudged cases<sup>g</sup>, the filing of a bill in equity shall equally prevent the alienation of assets, as the filing of an original at law. And, therefore, if a suit in chancery be instituted by a creditor against an executor, he cannot justify a voluntary payment of another creditor of the same order. But, a decision, to that effect, was reversed in the House of Lords, principally on the ground, that a decree cannot be pleaded at law in an action brought against an executor on another debt of equal rank. However, it is now settled that though a decree in equity cannot be pleaded at law, it is equivalent, in the administration of assets, to a judgment; and, therefore, that if a decree have a real priority in point of time, notwithstanding, and relation to the first day of term, it shall be preferred, in the order of payment, to subsequent judgments, and the executor, as we have seen, shall be protected in his obedience to such decree, and proceeding

proceedings against him at law, stayed by injunction<sup>b</sup>. So, pending a suit in equity by one creditor, an executor may confess a judgment at law, in favour of another creditor of the same degree<sup>c</sup>.

<sup>b</sup> Bunb. 48.  
<sup>c</sup> 3 P. Wms. 401.  
not. F. Forrest  
217. 1 Vern.  
143. 2 Vern. 37.  
88. Ca. Temp.  
Talbr. 217.  
4 Bro. P. C.  
287.

He may, also, confess a judgment, after a decree *quod computet*, if before a final decree. Such decree *quod computet*, is analogous to an interlocutory judgment at law; it does not pass in *rem indicatam*, until the final decree<sup>d</sup>.

<sup>d</sup> 1 P. Wms.  
295. Ca.  
Temp. Talb.  
225.

Nor will equity interpose, where, after an action brought by one creditor, an executor confesses judgment to another creditor in equal degree<sup>e</sup>; even, although the judgment be given on a *quantum meruit*, without a writ of enquiry to ascertain the damages, if they be so laid, in the declaration, as not to exceed the debt which is really due<sup>f</sup>. Nor, where a creditor sues an executor at law, and in equity, at the same time, for the same demand, will equity compel him to make his election which of the courts he will proceed, in case the executor be attempting to prefer other creditors before him, by confessing judgments to them, but will merely restrain him from taking out execution on the judgment, without leave of the court<sup>g</sup>. Nor will a mere demand by the creditor divest the executor of his right of giving such preference; that effect can be produced only by the process of a court of justice<sup>h</sup>. Thus, the executor is invested with large discretionary powers of preferring one creditor

<sup>e</sup> 2 Atk. 385.  
Ca. Temp.  
Talb. 217.

<sup>f</sup> 3 Bac. Abr.  
83. in not.  
1 P. Wms. 295.

<sup>g</sup> 11 Vin. Abr.  
298. in not.  
1 P. Wms. 295.

<sup>h</sup> 9 Bac. Abr.  
83. Bernard  
Ch. Ca. 277.

<sup>i</sup> Off. Ex. 145.

p 11 Vin. Abr.  
270. 288. Eid.  
21. Off. Ex.  
260.

q Off. Ex. 260.  
261. 3 Bl.  
Com. 19.

r 3 Bac. Abr.  
82. in not. L.  
of Ni. pr. 178.

a Dyer 32. in  
not. 3 Bac.  
Abr. 83. in not.  
Cro. Eliz. 793.  
2 Vern. 88, 89.  
Sed vid. L. of  
Ni. P. 178.  
3 Mod. 115.

t 3 Bac. Abr.  
83. in not.  
1 Mod. 175.  
Vid. Fitzgib.  
77.

creditor to another of the same class; and, in certain cases, he may avail himself of the privilege with great propriety, and on solid reasons<sup>a</sup>. But in general, on a deficiency of assets it were a more honourable and conscientious discharge of his duty as far as he has the power of deciding, to pay debts of equal degree in equal proportions<sup>q</sup>.

Nor is an executor warranted merely in the payment of one debt before another of the same order he may, also, pay a debt of an inferior nature before one of a superior, of which he has no notice<sup>r</sup>, provided a reasonable time has elapsed after the testator's death; for such payment, if precipitate, would be evidence of fraud.

Of debts of record, supposing, in the case of judgments, they are docketted, it has been already stated, an executor is bound to take cognizance, as well as of a decree in equity: constructive notice, in respect to them, is sufficient but of other species of debts there must be actual notice.

It has been asserted, that such notice must be by suit<sup>t</sup>; but it is perfectly clear, that an executor if he be by any means apprised of a debt of a higher degree, would not be justified in exhausting the assets in the discharge of one which is inferior yet, unless he had some notice of the former, he incurs no risk by the payment, after a competent time, of the latter. Hence it has been held, that



an executor may plead a judgment recovered against him on a simple contract, to an action of debt on a specialty, if he had no notice of such specialty"; and may, even, voluntarily pay, without notice, such inferior debt, in exclusion of the superior, and on a very just principle; for, otherwise, it might be in the power of an obligee to ruin an executor, by suppressing a bond until all the assets were expended in the payment of simple contract debts. And, indeed, after a suit is commenced, yet, before he has notice of the plaintiff's demand, he is warranted in paying any other creditor. On the other hand, an executor is not authorised to confess a judgment for a debt of an inferior nature, if he has notice of the existence of a superior. Thus, where an executor to an action on bond, pleaded a judgment confessed by him on the preceding day, on a simple contract debt, the plea was disallowed, on the ground of its not averring, that the defendant had no notice of the plaintiff's demand.

u 3 Bac. Abre  
82. in not.  
2 Show. 492.  
3 Mod. 115.  
L. of N. P. 178.  
Fitzg. 76.

w 3 Bac. Abr.  
82. Off. Ex.  
145. Vid. 3  
Lev. 115.

x Off. Ex. 145.  
Plowd. 279.  
Finch L. 79.  
3 Mod. 115.  
L. of Ni. Pr.  
178.

y Sawyer v.  
Mercer, 1  
Term Rep.  
690.

z Com. Dig.  
Admon. C. 2.  
3 Lev. 114.

a Com. Dig.  
Admon. C. 2.  
Cro. Eliz. 471.  
1 Sid. 404.  
1 Lev. 261.

b Com. Dig.  
Admon. C. 2.  
Cro. Eliz. 646.  
1 Sid. 404.  
Sed vid. Cro.  
Eliz. 41.

If, ignorant of the existence of a bond, he confesses a judgment of a simple contract, and, afterwards, judgment be given against him on the bond, he is bound, however insufficient the assets, to satisfy both the judgments, for he might have pleaded the first, if he had not had assets for both. So, also, a judgment must be satisfied, though recovered against one executor only where there are several; or recovered against one executor by the name of an administrator, or *vice versa*.

## C H A P. III.

OF AN EXECUTOR'S RIGHT TO RETAIN A DEBT DUE  
TO HIM FROM THE TESTATOR—UNDER WHAT  
LIMITATIONS.

**I**F a debtor appoint his creditor to the executorship, he is allowed to retain his debt, in preference to all other creditors of an equal degree. This remedy arises from the mere operation of law, on the ground, that it were absurd and incongruous that he should sue himself, or that the same hand should at once pay and receive the same debt. And, therefore, he may appropriate a sufficient part of the assets, in satisfaction of his own demand; otherwise he would be exposed to the greatest hardship; for, since the creditor who first commences a suit is entitled to a preference in payment, and the executor can commence no suit, he must, in case of an insolvent estate, necessarily lose his debt, unless he has the right of retaining. Thus, from the legal principle of the priority of such creditor as first commences an action, the doctrine of retainer is a natural deduction; but the privilege is accompanied with this limitation, that he shall not retain his own debt as against those of a higher degree; for the law places him merely in the same situation as if he had sued himself as executor, and recover his debt, which there

there could be no room to suppose, during the existence of those of a superior order. As, where A. before his marriage, covenanted with B. and C. to leave them by his will; or that his executors, within six months after his death, should pay them seven hundred pounds, in trust, to pay the interest to his wife for life, and, on her death, to divide the principal among his children, and, in default of children, as he should appoint, and bound himself, his heirs, executors, and administrators, in a penalty for performance; on his dying before his wife, without issue and intestate, it was held, that B. in the character of his administrator, might retain assets to that amount, during the life of the widow, against a bond creditor, who sued before the six months were elapsed <sup>b</sup>.

2 2 Bl. Com.  
511. 3 Bl.  
Com. 18, 19.  
Off. Ex. 32.  
142, 143.  
Com. Dig.  
Admon. C. 2.  
3 Bac. Abr. 10.  
83. Roll. Abr.  
922, 923.  
Plowd. 85.  
543. 11 Vin.  
Abr. 72, 262.  
Witch. 19.  
Hargr. Co.  
Litt. 264.  
Dot. 1.

b 3 Burr. 1380.

So, if A. and B. be jointly and severally bound in an obligation, and A. appoint the executrix of the obligee his executrix, and die, leaving assets, she is not compelled to resort to an action against him, but is entitled to retain for the debt; in case there be not assets, she has a right to pursue her remedy on the bond against B.<sup>c</sup> So, if A. be indebted to B. and C. by several bonds, and die, and take out administration to A., and, afterwards, die, having appointed D. his executor, he may retain effects of which he is possessed as administrator of A., to satisfy the debt due to him as the executor of B.<sup>f</sup> If A. be indebted in a bond to B., and die, having appointed B. his executor, B., after having intermeddled with the goods, and

c Com. Dig.  
Admon. C. 1.  
Hob. 10 3 Bac.  
Abr. 10.  
3 Kebl. Rep.  
116. 2 Lev. 73.

f 11 Vin. Abr.  
261. 2 Brownl.  
50.



and before probate, also dies; although, before his death, he did not expressly elect in what particular effects he would have the property altered, yet, it must be presumed, that it was his intention to pay his own debt first, and, therefore, his executor shall have the same power of retaining as belonged to him<sup>e</sup>. So, for a bond executed by the testator to A. conditioned for the payment of money to B., B. it seems, in case he is executor may retain<sup>h</sup>. So, if administration be granted to a creditor, and afterwards repealed at the suit of the next of kin, such creditor may retain against the rightful administrator<sup>i</sup>. In short, wherever an executor might have been sued, or might have paid a debt, he has authority to retain<sup>k</sup>.

But, where A. and B. were joint obligors in a bond, the former as principal, the latter as surety A. died, B. took out administration to him, and on forfeiture of the bond, discharged the debt: it was held, that he could not retain, for, by joining in the bond, the debt became his own<sup>l</sup>. Yet in such case, it seems, he might retain for the money paid, as constituting a simple contract debt.

A retainer for a debt may either be given in evidence, on the plea of *plene administravit*, or it may be pleaded specially<sup>m</sup>.

An executor may retain, both at law and in equity, for his whole debt, as against other creditors of the same degree<sup>n</sup>: but, equity will inter-

g 11 Vin. Abr.  
263. 3 P.  
Wms 183,  
184. and note  
B.

h Com. Dig.  
Admon. C. 2.  
Sembl. Raym.  
484.

i 11 Vin. Abr.  
265. 1 Salk 38.

k Com. Dig.  
Admon. C. 2.  
3 Burr. 1384.

l 11 Vin. Abr.  
262. Godb.  
149.

m RL Rep 965.  
3 Burr. 1383.  
11 Vin. Abr.  
266. 1 Brownl.  
75.

n 11 Vin. Abr.  
265. in not.  
1 P. Wms. 295.

pose to restrain him from perverting this privilege to the purposes of fraud<sup>o</sup>. Nor will a mere nomination of a creditor to the executorship, if he refuse to act, extinguish his legal remedy for the recovery of his debt<sup>p</sup>. Hence, if a creditor be appointed executor with others, he may sue them, especially if he hath not administered<sup>1</sup>. If there be not personal assets he may sue the heir, where the heir is bound<sup>2</sup>.

o 3 Bac. Abr.  
83 in not.  
10 Mod. 496.  
p Rawlinson  
v. Shaw,  
3 Term Rep.  
557.  
q 3 Bac. Abr.  
10. in not.  
Off. Ex. 23.  
r Hargr. Co.  
Litt. 264. b.  
not. 1. Salk.  
304. Off. Ex.  
32. 34.

## C H A P. IV.

## OF THE PAYMENT OF LEGACIES.

## S E C T. I.

*Legacy, what—who may be legatees—who not—legacies general and specific—lapsed and vested.*

**H**AVING thus discussed the duty of an executor in regard to the payment of debts according to the order prescribed by law, the payment of legacies, in the next place, demands his attention.

A legacy is a bequest, or gift of personal property by will.

All persons are capable of being legatees, with some special exceptions by common law, and by statute<sup>a</sup>.

<sup>a</sup> 2 Bl. Com. 512. 4 Burn Eccl. L. 313. 4 Bac. Abr. 337.

<sup>b</sup> 2 Bl. Com. 512.

To this disability all traitors are subject<sup>b</sup>. By stats. 25 Car. 2. c. 2. and 1 Geo. 1. stat. 2. c. 13 persons required to take the oaths, and otherwise qualify themselves for offices, and omitting to do so, shall be incapable of a legacy. By stat. 9 & 10 Wm. 3. c. 32. persons denying the Trinity, or asserting that there are more Gods than one, or denying the Christian religion to be true, or the



holy scriptures to be of divine authority, shall for the second offence be also incapable of any legacy. Likewise, by stat. 5 Geo. 1. c. 27. artificers going out of the kingdom, to exercise or teach their trades abroad, or exercising their trades in foreign parts, shall not return into this realm within six months next after due warning given them, shall be subject to the same disqualification.

Of legacies there are two descriptions; a general legacy, and a specific legacy. The former appellation is expressive of such as are pecuniary, or merely of quantity. Under the denomination of specific legacies, two kinds of gifts are included; first, where a certain chattel is particularly described, and distinguished from all others of the same species; as, "I give the diamond ring presented to me by A." The second is, where a chattel of a certain species is bequeathed without any designation of it as an individual chattel; as, "I give a diamond ring." A bequest in the former mode can be satisfied only by the delivery of the identical subject; and if it be not found among the testator's effects, it fails altogether, unless it be in pawn, when the executor must redeem it for the legatee. But a bequest of the latter description may be fulfilled by the delivery of any thing of the same kind.

Although the courts are averse from construing legacies to be specific, yet, if the words clearly indicate an intention to separate the particular thing bequeathed from the general property of the testator, they

c. 4 Bat. Abr.  
337, 455. 3 Bl.  
Com. 512.

d. 1 Bro. Ch.  
Rep. 113.  
4 Bac. Abr.  
355. Swinb.  
part 7. l. 20.

c. 2 Fonbl. 374.  
note (o).  
1 Atk. 416.  
Forrest 227.  
Ambl. 37.  
f. Ambl. 310.

g 1 Atk. 508.

h 1 P. Wms.  
540.

i Ambli 310.

k 2 Bro. Ch.  
Rep. 108.

Forrest, 152.

1 Vef. 415.

i Eq. Ca. Abr.  
298.

l 2 Bro. Ch.

Rep. 1 5.

m 3 Atk. 103.

n 2 Vef. 563.

See 2 Fonbl.

374. note (c).

1 P. Wms. 540.

note (i).

o 2 Fonbl. 376.

2 Vern. 688.

p 2 P. Wms.

540. not

1 Atk. 414.

2 Vef. 562.

q Ca. Temp.

Talbot, 227.

they shall have that operation. Hence, under some circumstances, even pecuniary legacies are held to be specific. As a certain sum of money in a certain bag or chest<sup>g</sup>, or the bequest of a sum of money in the hands of A.<sup>h</sup>, or of two thousand pounds, the balance due to the testator from his partner on the last settlement between them, if the testator did not draw such money out of trade before he died<sup>i</sup>. So a bequest of a bond, or of the testator's stock in a particular fund, hath been thus classed<sup>k</sup>, as likewise has a legacy to be paid out of the profits of a farm, which the testator directed to be carried on<sup>l</sup>.

In like manner the testator may carve specific legacies out of a specific chattel; as where he gives part of the debt due to him from A., it will be a specific legacy<sup>m</sup>. So a bequest of a part of the testator's stock in a certain fund, shall bear the same construction<sup>n</sup>.

So where A. devised to his wife all his personal estate at B., this was held to be a specific legacy, and the same as if he had enumerated all the particulars there<sup>o</sup>.

On the other hand, a mere bequest of quantity, whether of money, or of any other chattel, is a general legacy; as of a quantity of stock<sup>p</sup>. And where the testator has not such stock at his death, such bequest amounts to a direction to the executor to procure so much stock for the legatee<sup>q</sup>. Such purpose to which a general legacy is to be applied.

plied will not alter its nature; as where it is directed to be laid out in land. Personal annuities given by will, are also general legacies.

r 1 P. Wms. 540.  
3 Atk. 693.  
2 Vef. 417.  
2 Fonbl. 372.

In a case before Lord Camden C. his Lordship took the distinction between a legacy of a certain sum due from a particular person, and a legacy of such debt generally, considering the former as a legacy of quantity, the latter as specific. So, in another case, where, after the following bequest, "I give to A. one thousand four hundred pounds, for which I have sold my estate this day;" the testator received the whole of that sum, paid it into his banker's, and drew out one thousand one hundred pounds of the money; this was also held by Lord Bathurst C. to be a legacy of quantity. But Lord Thurlow C. disallowed that distinction; and held a legacy of "the principal of A.'s bond for three thousand five hundred pounds," to be a specific legacy, notwithstanding the sum was named.

2 P. Wms. 330. not.  
Ambl. 566.

u Carteret v. Carteret, cited  
2 Bro. Ch. Rep. 114.  
w Ashburner v. Macguire,  
2 Bro. Ch. Rep. 113, 114.

Such are the different species of legacies. They are next to be considered as lapsed, or vested. It is a general rule, that if a legatee die before the testator, the legacy shall be lapsed. And although the bequest of a legacy to A. the testator should express an intention, that the legacy should not be excluded in case A. die before him, this is not sufficient to exclude the next of kin. Yet a bequest may be so specially framed, as to prevent its lapse on the previous death of the legatee, as if in case of the

4 Bac. Abr. 387. 2 Fonbl. 368. not. (g).

7 Atk. 372.



<sup>a</sup> 3 Atk. 572.  
See also 3 Atk.  
580.

<sup>a</sup> Gilb. Rep.  
137-2 Atk. 110.

<sup>b</sup> 1 And. 33.  
pl. 81. 2 Vern.  
107. 1 P. Wms.  
274. 2 P. Wms.  
328. 3 P. Wms.  
113. Prec Ch.  
37. Mosely.  
319. 2 Vern.  
378. 2 Fonbl.  
368. not. (g).

<sup>c</sup> See 1 Vef. 140.  
2 Vern. 468.  
2 Fonbl. 369.  
not. (g). & (h).

<sup>d</sup> 1 Fonbl. 368.  
4 Bac. Abr.  
419.

<sup>e</sup> Vid sup.  
131, 132.  
2 Fonbl. 371.  
not. (k)  
2 Vent. 342.  
2 Ch. Ca. 155.  
1 Vern. 461.  
3 P. Wms. 138.  
2 Vern. 499.  
2 Vent. 341.  
2 Salk. 415.  
1 Bro. Ch. Rep.  
119.

the death of A. before the testator other persons are named to take; the legacy on A.'s so dying shall vest in such nominees<sup>a</sup>. Nor is a legacy to two or more within the rule; for it is settled, that a legacy to several persons is not extinguished by the death of one of them, but shall vest in the survivor<sup>b</sup>. Nor does the rule extend to a legacy given over after the death of the first legatee, for in such case the legatee in remainder shall have it immediately<sup>c</sup>. Nor, as it seems, will a legacy lapse by the death of the legatee in the testator's life-time, if he is to take in the character of trustee<sup>d</sup>.

A legacy is also lapsed, if, before the condition on which it is given by the will be performed, the legatee die, or if he die before it is vested in interest<sup>d</sup>.

We have already seen, that if a legacy be left to A. payable to him at a certain age, it is a vested and transmissible interest in him, *debitum in presentia* though *solvendum in futuro*: That it is otherwise if the legacy be left to him at, or when he attains such age<sup>e</sup>. The distinction was borrowed from the civil law, and adopted by our courts, not so much from its intrinsic equity, as from its prevailing in the spiritual courts; for, since the chancery, as will be hereafter shewn, has a concurrent jurisdiction with them in respect to the recovery of legacies, it is reasonable, that there should be a conformity in their decisions; and that the subject should have the same measure of justice, to whatsoever court he

may resort. But if such legacies be charged on a real estate, in either case they shall equally lapse for the benefit of the heir; for with regard to devised affecting lands, the ecclesiastical courts have no concurrent jurisdiction, and therefore the distinction does not extend to them. If, as I have before stated, the legacy be made to carry interest, though the words, "to be paid," or "payable," be omitted, it is vested, and transmissible. So if the bequest be to A. for life, and, after the death of A., to B.; the bequest to B. is vested, on the death of the testator, and will not lapse by the death of B. in the life-time of A.

1 Bac. Abr. 393. 2 Bl. Com. 513. 1 Eq. Ca. Abr. 295. 2 P. Wms. 601. 2 Fonbl. 373. not. (m).  
2 Fonbl. 373. not. (k).  
2 Ventr. 342.  
2 Chan. Ca. 155. 2 Vern. 673. 2 Vef. 263. 3 Atk. 645.  
1 2 Fonbl. 371. not. (k).  
2 Ventr. 347.  
1 P. Wms. 566.  
2 Vern. 378.  
Ambl. 167.  
1 Bro. Ch. Rep. 119. 181.

## SECT. II.

*the executor's assent to a legacy—On what principle necessary—What shall amount to such assent—Assent express, or implied—absolute or conditional—its relation to the testator's death—when once made irrevocable—when incapable of being made.*

BUT the bequest of a legacy, whether it be general, or specific, transfers only an inchoate property to the legatee. To render it complete, and perfect, the assent of the executor is requisite. On all the testator's personal property is devolved, to be applied, in the first place, to the payment of legacies; and therefore, before he can pay legacies

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2 3 Bac. Abr. 84. 2 Bl. Com. 512. Hargr. Co Litt. 118. Aleya. 39.

with safety, he is bound to see, whether, independently of them, a fund has been left sufficient for the demands of creditors.

In case the assets prove inadequate, the legacies must abate or fail altogether, according to the extent of the deficiency. If, on a failure of assets, he pay legacies, he makes himself personally responsible for the debts to the amount of such legacies. Hence, as a protection to the executor, the law imposes the necessity of his assent to a legacy before it can be absolutely vested; and such assent, when once given, is considered as evidence of assets, and an admission on the part of the executor, that the fund is competent.

b Off. Ex. 27-28.

If without the assent of the executor the legatee take possession of the thing bequeathed, the executor may maintain an action of trespass against him. Nor even in case a specific legacy, whether a chattel real or personal, be in the custody or possession of the legatee, and the assets be fully adequate to the payment of debts, has he a right to retain in opposition to the executor, by whom in such case an action will lie to recover it. Nor has such legatee authority to take possession of the thing without the executor's assent; although the testator by his will expressly direct that he shall do so; if this were permitted, a testator might appoint his effects to be thus taken in fraud of his creditors. Yet, previous to the assent of the executor, a legatee has such an interest in the thing bequeathed

c Off. Ex. 27-28. 3 Bac. Abr. 84 4 Bac. Abr. 444. Dyer 254. Keilw. 118.

d Off. Ex. 222, 223.

e Off. Ex. 113.



bequeathed, as that in case of his death, before it be paid, or delivered, it shall go to his representative; or, in case of the outlawry of the legatee, shall be subject to the forfeiture.

f Off. Ex. 28:

g Vid. Off. Ex. 29.

If A. release by will a debt due to him from B., it is the better opinion, that the assent of the executor is necessary to give effect to the testator's intention: for, although on the one hand it may be alleged, that the party to whom the debt is bequeathed, must necessarily have it by way of release, and that such a clause operates rather as an extinguishment, than as a donation, and therefore it needs no such assent as where there is to be a transfer of the property: yet on the other hand, the debt so released is regarded, with greater reason, in the light of a legacy, and like other legacies, must be sanctioned by the executor, in case the estate be insufficient for the payment of debts. But as soon as the executor assents, and not before, it shall be effectually discharged.

h Off. Ex. 29.  
30. 2 P. Wms.  
332: Vid.  
1 P. Wms. 23.  
3 Atk. 520.

With respect to what shall constitute such assent on the part of the executor, the law has for this purpose prescribed no specific form; a very slight assent is held sufficient. It may be either express, implied, absolute, or conditional.

i 1 Vern. 94.  
460. 2 Vent.  
358. 4 Bac.  
Abr. 445.

The executor may not only in direct terms authorize the legatee to take possession of the legacy, but his concurrence may be inferred either from direct expressions, or particular acts. And such

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constructive permission shall be equally available. Thus, for instance, if the executor congratulate the legatee on his legacy, or if a horse is bequeathed to A., and the executor requests him to dispose of it, or if B. proposes to purchase the horse of the executor, and he directs B. to buy it of A. or if the executor himself purchase the horse of A. or merely offer him money for it, this in either case amounts to an assent by implication to the legacy. So, where A. the devisee of a term granted it to the executor, his acceptance of the grant from A. was held to be an implied permission that the term should be A.'s to grant. So where J. S. seised in fee of a foreign plantation devised it to A., and the executor granted a lease of it for years, reserving rent in trust for A., this was adjudged a sufficient assent.

4 Pac. Abr.  
445. Off. Ex.  
226. Com. Dig.  
Admon. C. 6.

1 Off. Ex. 226.

2 Vent. 358.

If a term be devised to A. for life, remainder to B., the assent of the executor to the devise to A. shall operate as an assent to the devise over to B. and vest an interest in him accordingly. So, an assent to such estate in remainder is an assent to the present estate. For the particular estate and the remainder, constitute but one estate. But a lessee bequeath a rent to A., and the land to B. the executor's assent that A. should have the rent is no assent that B. should have the land, because the rent and the land are distinct legacies; but under special circumstances, an executor's assent to one legacy may enure to another, as if the case last mentioned be reversed: The executor's assent that

Com. Dig.  
Admon. C. 6.  
10 Co. 47. b.  
1 Roll. Abr. 620.  
Plowd. 545. in  
not. 3 P. Wms.  
12.

Com. Dig.  
Admon. C. 6.  
Off. Ex. 226.

B. should

B. should have the land, seems to imply his assent that A. should have the rent; for the necessity of the executor's assent is established with a view to creditors; now to them the land is equally unproductive, whether it passes to B. charged with the rent, or not: and also, as it was the testator's intention, that B. should hold the land subject to the rent to A., the executor's assent to B.'s having the land shall, in conformity to the will, be construed an assent to the legacy to A.<sup>1</sup> So an assent to a devise of a lease for years, is an assent to a condition or contingency annexed to it. As, if there be a devise of a term to the testator's widow, so long as she continued unmarried; and if she marry, then of a rent payable out of the land; the executor's assent to the devise of the term, is an assent to that of the rent in case of the devisee's marriage.<sup>2</sup>

<sup>1</sup> Off. Ex. 137.

<sup>2</sup> Com. Dig.  
Admon. C. 6.  
1 Roll. Abr.  
629.

An assent may also be absolute, or conditional. If it be of the latter description, the condition must be precedent. As, where the executor assents to the devise of a term, if the devise will pay the rent in arrear at the testator's death. In that case, if the condition be not performed, there is no assent; but if the assent be on a condition subsequent, as provided the legatee will pay the executor a certain sum annually; such condition is void, and a failure in performing it shall not divest the legatee of his legacy.<sup>3</sup> The state of the fund may require the executor to impose a condition precedent to his payment of the legacy; but if he once part with it, he has no right to clog it with future stipulations;

<sup>3</sup> Com. Dig.  
Admon. C. 8.  
Off. Ex. 238.  
4 Bac. Abr. 445.  
Leon. 130, 131.



tions; and make that legacy conditional, which the testator gave absolutely<sup>1</sup>.

The assent of an executor shall have relation to the time of the testator's death. Hence, if A. devise to B. his term of years in tithes, in an advowson, or in a house or land, and after the testator's death, and before the executor's assent, tithes are set out, the church becomes void, or rent from the under-tenant becomes payable, the assent by relation shall perfect the legatee's title to these several interests<sup>2</sup>. So such assent shall by relation confirm an intermediate grant by the legatee of his legacy<sup>3</sup>.

If an executor once assent to a legacy, he can never afterwards retract, and, notwithstanding subsequent dissent, the legatee has a right to take the legacy<sup>4</sup>.

<sup>1</sup> Off. Ex. 227.  
<sup>2</sup> Bac. Abr. 445.

If a term is devised to A., and the executor before he assents to the devise takes a new lease of the same land to himself for a larger term in possession, or to commence immediately, the term devised is merged, so that it cannot pass to A. although the executor should afterwards assent<sup>5</sup>. An assent to a void legacy, is also void<sup>6</sup>.

<sup>5</sup> Off. Ex. 228.  
<sup>6</sup> Plowd. 526.

Such is the nature of an executor's assent to a legacy. We have already seen, that he is competent to give it before probate<sup>7</sup>. But if he has not attained the age of twenty-one years, he is incapable, by the abovementioned stat. 38 Geo.

<sup>7</sup> Vid. supr. 24.

§ 87<sup>b</sup>. of the functions of an executor, and therefore his assent is of no validity<sup>c</sup>.

<sup>b</sup> Supr. 12.  
<sup>c</sup> Vid. Com.  
Dig. Admog.  
E. Off. Ex. 224.

S E C T. III.

*When a legacy is to be paid—To whom—Of payment in the case of infant legatees—Of a conditional payment of a legacy—Of payment of interest on legacies—Of such payment where the legatees are infants—Of the rate of interest payable on legacies..*

ON the same principle that the assent of an executor to a legacy is necessary, he cannot before a competent time has elapsed be compelled to pay it. The period fixed by the civil law for that purpose, which our courts have also prescribed, and which is analogous to the statute of distributions, (as will be hereafter seen), is a year from the testator's death, during which it is presumed he may fully inform himself of the state of the property<sup>a</sup>.

<sup>a</sup> 4 Bac. Abr.  
434. 2 Salk.  
415. pl. 2.

If a legacy to an infant be payable at twenty one, and he die before, his representative cannot claim till, in case he had lived, he would have come of age<sup>b</sup>; unless it be payable with interest, and then, as we have seen, such representative has a right immediately to receive it<sup>c</sup>. In case a legacy be left to A. at twenty-one, and if he die before twenty-one, then to B.; and A. die before he attains that age, B. shall be entitled to the legacy immediately; for

<sup>b</sup> 2 Vern. 31.  
199, 283.  
<sup>c</sup> 4 Bac. Abr.  
434. in not.  
1 Stra. 238.  
2 P. Wms. 337.  
480. Ambl. 588.  
1 Ves. 118.  
1 Bro. Ch. Rep.  
105. 1 Ves. 307.  
3 Ves. jun. 10.  
Vid. supr. 131.

he

he does not claim under A., but the devise over is a distinct, substantive bequest, to take effect on the contingency of A.'s dying during his minority<sup>d</sup>.

d 1 Eq. Ca. Abr.  
399, 300.

But where legacies were given to A. B. and C., the three co-heiresses of the testator, to be paid at their respective marriages, and if either of them should die, her legacy to go to the survivors, and one of them died unmarried; it was held, that the survivors should not receive the legacy of the deceased before their respective marriages; for the condition, though not repeated, was annexed to the whole, whether it accrued by survivorship, or by the original devise<sup>e</sup>.

e 2 Vern. 620.

The next object of enquiry is, to whom a legacy shall be paid: And here the executor must be careful to pay it into that hand, which has authority to receive it.

f 4 Bac. Abr.  
429. 1 Chan.  
Ca. 245.

It is a general rule, that he has no right to pay it to the father, or any other relation of an infant without the sanction of a court of equity<sup>f</sup>; and even in the case of an adult child, such payment is not good, unless it be made by the consent of the child, or be confirmed by his subsequent ratification<sup>g</sup>.

g 4 Bac. Abr.  
431. 3 Bro. Ch.  
Rep. 97.

Cases occur, where an executor has, with the most honest intentions, paid the legacy to the father of the infant, and has been held liable to pay it over again to the legatee on his coming of age.

And



And although such cases have been attended with many circumstances of hardship in respect to the executor, yet he has been held responsible, on the policy of obviating a practice so dangerous to the interest of infants, and so naturally productive of domestic discord. The child must in case of such payment either acquiesce, or resort to the father; or, which is in effect the same, institute a suit against the executor, who will of course require the father to refund<sup>h</sup>. Thus legacies of one hundred pounds a-piece, were bequeathed to four infants; the executor paid the legacies to the father, and took his receipt for them: When one of the legatees came of age, who was about ten years old at the time of payment, the father told him, that he had such a legacy of his in his hands, but could not pay it immediately, and requested him not to apply to the executor, at the same time promising, that he would himself pay it: The son acquiesced for fourteen or fifteen years, during which period his father and he carried on a joint trade, and then became bankrupts: On a commission taken out against the son, his legacy, among other things, was assigned for the benefit of his creditors; and the assignee filed a bill against the executor, for an account and payment of the legacy, when it was decreed accordingly by the Master of the Rolls, but without interest; and the decree affirmed by the Lord Chancellor on an appeal. His lordship, however, on the hardship of the case, ordered the deposit to be divided<sup>i</sup>. It appears from the registrar's book, that in the above case evidence was

<sup>h</sup> 1 Eq. Ca. Abr. 300. 3 Bro. Ch. Rep. 96. 4 Burn Eccl. L. 321. 3 Ch. Ca. 162.

<sup>i</sup> 1 Eq. Ca. Abr. 300. 1 P. Wms. 285. 8. C. Gilb. Rep. 103. 8. C. 4 Burn Eccl. L. 321. 8. C. Vid. also 3 Bro. Ch. Rep. 96.

read

k. P. Wms.  
286 in not.  
3 Bro. Ch. Rep.  
96.

12 Bro. Ch.  
Rep. 96. Vid.  
2 P. Wms. 421.

m Vid. infr.  
249.

read, that the testator on his death-bed gave direction, that the executor should pay the legacies to the father of the infants, that he might improve the money for their benefit<sup>k</sup>. But although that circumstance, if true, rendered the case still harder, yet it could not influence the decision, since the evidence ought not to have been received. It were dangerous to admit proof, that a legacy given to one person was ordered to be paid to another<sup>l</sup>. If the direction had appeared on the face of the will, the decree, doubtless, would have been different<sup>m</sup>. So, where A. left a legacy of a hundred pounds to each of the three children of B. and appointed C. her executor, leaving him the bulk of her estate, provided he paid those three legacies within a year after her death: The defendant within that period put into the children's own hands their several legacies; the eldest of whom was then sixteen years, the second fourteen, and the youngest only nine: On her coming of age they filed their bill against the executor to be paid their respective legacies; suggesting that their father had embezzled the money, and was insolvent, and that the payment was a fraud: The defendant in his answer denied all knowledge of the money ever having come to the father's hands: The Lord Chancellor held, at first, that as the executor paid these legacies to save a forfeiture of what he himself took under the will, he ought not to pay them over again; but on farther consideration, conceiving the point to be very doubtful, his lordship recommended a compromise; and the defendant agreed

to pay fifty pounds, to be divided between the three plaintiffs, without costs on either side. they were ordered to release their legacies<sup>n</sup>.

n 1 Ark. 80, 81.

The rule, however, is not so harsh; as that in all possible cases an executor shall be liable to pay over again legacies of infants which he shall have paid to their parents<sup>n</sup>. Thus, where A. bequeathed to J. S. a hundred pounds to be equally divided between himself and his family, the executrix paid the legacy to J. S. who had a wife, and seven children, six of whom were adults, and the seventh an infant: Eleven years after the youngest had come of age, and the legacy never having been demanded, they filed their bill against the executrix for the same, insisting that the payment to their father was invalid: It was held, that, according to the terms of the will, the legacy was properly paid to J. S.; and that it belonged to him as trustee to divide it: And even on supposition, that the payment was wrong, the great laches, and long acquiescence of the plaintiffs, precluded them from all remedy<sup>n</sup>. But where A. bequeathed his personal estate to trustees in trust, to pay six hundred pounds to an infant, and directed, that such of his legatees as might be infants at the time of his decease, should receive interest at the rate of five per cent. till their respective legacies should be paid, namely, at their age of twenty-one years; it was holden, that the executors could not justify paying any part of the principal to the infant, or to his use, before that time, except for absolute necessities<sup>n</sup>.

o 1 Ark. 81.

p Cooper v. Thornton, 3 Bro. Ch. Rep. 96.

q 4 Bac Abr. 433. Davies v. Austen. 3 Bro. Ch. Rep. 178.

In



4 Burn Eccl.  
L. 321. 1 Ch.  
Ca. 245. 2 Atk.  
51. Com. Dig.  
Chancery,  
(2 G. 6.) Vid.  
2 Bro. Ch. Rep.  
613.

3 Atk. 629.  
Per Lord  
Hardwicke C.  
arguendo.

4 Bac. Abr.  
429 in not.  
Godb. 243.

4 Bac. Abr.  
340. 2 Vern.  
513. 2 Vef. 640.  
1 a Temp.  
Talb. 72.

1 Vern. 355.

2 Vern. 421.

In case a legacy be too inconsiderable in point of value, to bear the expence of an application to the court of chancery, it seems an executor will be justified in paying it into the hands of the infant, or, which amount to the same thing, to the father; but in general he is not warranted in so doing, unless he be clearly authorised by the will. And if a suit be instituted in the spiritual court for an infant's legacy by the father, to have it paid into his hands, an injunction, or prohibition will be granted.

If an executor have a general power to divide a sum of money among children at his discretion and he make an unreasonable disposition, it will be controlled in a court of equity". As, where A. having two daughters; one by a former marriage and the other by a second, devised his estate to his wife, to be distributed between his daughters as she should think fit, and she gave a thousand pounds to her own daughter, and only a hundred to the other, an equal distribution was decreed.

In like manner where A. having appointed his two daughters his executrices, gave them four hundred pounds to be distributed among themselves and their brothers and sisters, according to their necessity, as the executrices, in their discretion should think fit, the court settled the distribution and decreed a double share to one of the children as standing in greater need of it.

If a legacy be given to a married woman, it must be paid to the husband. So where a legacy was given to a married woman living separate from her husband with no maintenance, and the executor paid it to the wife, and took her receipt for it, yet on a suit instituted by the husband against the executor, he was decreed to pay it over again, with interest<sup>a</sup>. It hath also been adjudged, that if the husband and wife are divorced, *à mensâ et moro*, and a legacy is left to her, the husband alone may release it<sup>b</sup>, and consequently to him alone it is payable. But the executor, in cases where the husband has made no provision for the wife, may decline paying such legacy, unless he will make an adequate settlement on her. Nor will the court of chancery interpose in his favour, but on the same terms<sup>c</sup>; unless the wife appear in court, and consent to his receiving it<sup>d</sup>.

y 1 Vern. 261.  
4 Burn Eccl.  
L. 332.  
2 4 Bac. Abr.  
433. 1 Roll.  
Abr 343.  
2 Roll. Abr.  
301. Moore,  
665, 683.  
Cro. Eliz. 902.  
Noy 45.  
1 Roll. Rep.  
426. 3 Bull.  
264. Salk. 115.  
pl. 4. Ld. Raym.  
73. 5 Mod. 69.  
12 Mod. 891.  
2 2 P. Wms.  
639. 3 P. Wms.  
11, 202.  
b 2 Atk. 67.  
2 P. Wms. 641.  
2 Vef. 60. Sed.  
vid. 2 Vef. 579.

If a legacy be left to the senior six clerk, to be divided between himself, and the other six clerks, it seems that it ought to be paid to the senior, and that it would not be incumbent on the executor to make any enquiry respecting the others<sup>e</sup>.

c Per M. R.  
arguendo.  
3 Bro. Ch. Rep.  
99.

It may be unsafe for an executor, under certain circumstances, to make an absolute payment, or delivery of a legacy, and in such case it is advisable for him to pay or deliver it conditionally, and to the security of the legatee, in an event specified, to stand<sup>f</sup>. As, if A. bind himself in an obligation for performance of a particular act, and bequeath divers legacies,

d 4 Burn Eccl.  
L. 332.  
2 Ventr. 358.

legacies, and die, leaving only sufficient to satisfy the bond in case of forfeiture; yet the bond shall not hinder the payment of the legacies, because it is uncertain whether it will ever be forfeited; but, in such case, the executor shall pay the legacy, on condition that, if judgment be recovered against him on the bond, the legatee shall refund. And if a suit be instituted in the spiritual court to compel him to pay the legacy, without a security to that effect, a prohibition shall issue<sup>e</sup>. Formerly indeed, in all cases, an executor might oblige legatees to give security to refund, in case of a deficiency of assets<sup>f</sup>; but that practice no longer exists. On a bill for the payment of a legacy the court of chancery, in general, will not require such security<sup>g</sup>. Equity will compel a legatee to refund, where the estate proves insufficient, whether security has been given for such a purpose or not<sup>h</sup>.

e 3 Bac. Abr. 84. 1 Roll. Abr. 928. Vid. sup. 222.

f 2 Ventr. 358. 1 Vern. 93.

g 4 Burn Eccl. L. 352, 333. r Chan. Ca. 149.

h 1 Atk. 491.

i 1 Vern. 93, 94.

In regard to the payment of interest on a legacy, in case of a vested legacy charged on lands yielding immediate profits, and no time of payment mentioned in the will, interest shall in respect of such profits, be payable from the death of the testator<sup>k</sup>. If a legacy be given out of a personal estate, consisting of mortgages bearing interest, or of money in the public funds, the dividends of which are paid half-yearly, in these cases, the legacy, for the same reason, shall carry interest from the same period<sup>l</sup>. But, if a legacy be given generally out of the personal estate, and no time of payment be specified by the testator

k 4 Bac. Abr. 439. 2 P. Wms. 26. 2 Bl. Com. 513.

l 2 P. Wms. 26 and not. 2. 2 Atk. 108. 1 Ves. 308. Bunb. 240. and 3 P. Wms. 233.



testator, such legacy shall carry interest only from the expiration of the year next after his decease; for the executor may be reasonably allowed that time for the collecting of the effects". If a legacy be given, charged on a dry reversion, it shall carry interest from a year next after the death of the testator, inasmuch as a year is a competent time for a sale". Interest on a specific legacy, where it produces interest, shall be computed from the time of the testator's death. It is severed from the rest of his estate, and specifically appropriated for the benefit of the legatee, and shall, therefore, carry interest immediately".

m 2 P. Wms.  
26. 2 Atk. 108.

n 2 P. Wms.  
26.

o 1 Atk. 508.  
2 Vef. 363.

If a legacy, whether vested or not, be payable on a certain day, and the will be silent in respect to interest, it is a general rule, the interest shall commence only from that time; for it is given for delay of payment, and, consequently, till the day of payment arrives, no interest can accrue to the legatee". Hence, as we have seen<sup>q</sup>, if a legacy be left to A. to be paid at twenty-one, and he die before, his representative shall wait till he would have attained that age, unless it were made payable with interest. Nor is it, in such cases, a question of construction, as whether the payment is suspended on account of the imbecility of the party, or with a view to the benefit of the estate. The rule I have just stated is technical, established in the ecclesiastical court, and adopted by the court of chancery in numerous adjudications".

p 3 Atk. 716.

1 Vef. 307.

2 Salk. 415.

pl. 2. 2 P.

Wms. 481.

not. 1. 1 Bro.

Ch. Rep. 105.

3 Vef. jun. 10.

4 Vef. jun. 1.

q Supr. 131,

245.

r 4 Vef. jun.

3, 4, 5.

But

But the principle does not extend to all cases. It does not apply where the legatee was the child of the testator: There the court will not postpone the payment of interest, even till a year after the death of the parent, but will order it immediately, since, by the law of nature, he was obliged to provide not only a future but a present maintenance for his child, and shall not be presumed to have meant to leave him destitute<sup>a</sup>.

<sup>a</sup> 3 Atk. 60.

<sup>b</sup> 3 Vef. jun. 13.

Whether a legatee, if a natural child, be also comprised within the exception, is not so clear. Lord Hardwicke C. expressed an opinion in the negative, as well on the principle of law, which recognises no relationship in such a child, as also on the general policy of encouraging marriage and discountenancing immorality<sup>b</sup>. But, in a recent case, the Master of the Rolls intimated, that illegitimate children were to be admitted to the same benefit<sup>c</sup>.

<sup>b</sup> 1 Vef. 310.

<sup>c</sup> 3 Vef. jun. 12.

Whether a grand-child shall be thus favoured, is a point likewise on which there has been a difference of opinion: such advantage has been, in several instances, denied to him.

<sup>d</sup> 2 Atk. 330.

<sup>e</sup> 3 Atk. 59.

<sup>f</sup> Bro. Ch. Rep.

149. in not.

<sup>g</sup> 3 Vef. jun. 12.

But his honour, in the case just alluded to, appears to have considered him as on the same footing with a child<sup>d</sup>. A legacy to a nephew payable at twenty-one, is clearly comprehended under the general rule, and shall carry interest on

<sup>f</sup> 3 Vef. jun. 12.

from the time of payment<sup>e</sup>. But the rule is not applicable to a bequest of a residue, subject to be vested on a contingency; for it would be absurd

to say the testator meant to die intestate as to the produce, when he has given a vested interest in the capital<sup>g</sup>. If a legacy be left to an infant, payable at twenty-one, and devised over on his dying before he attains that age, and such event happens, the interest, accumulated from the death of the testator to that of the infant, shall go to his representative, and not to the remainder-man<sup>h</sup>.

g 1 P. Wms.  
420. Vid. 4 Vef.  
jun. 4.

h 1 P. Wms.  
500. 2 P. Wms.  
421. not. 1.  
2 Atk. 473.  
1 Bro. Ch.  
Rep. 31. ibid.  
335. Ambl. 448.  
Vid. 3 Atk. 59.

If the father of an infant legatee be living, he is bound by the municipal law, as well as by the law of nature, to maintain his child. Nor, as it has been frequently held, shall the interest of the legacy be applied to that purpose, unless in cases of great necessity, arising from the distressed and embarrassed circumstances of the parent<sup>i</sup>. In cases pressing the infant shall be maintained out of the interest of the legacy, whether it be vested or contingent, and, although the legacy be devised over to the infant dying before he attains twenty-one. Indeed, in some recent instances, where the will has contained an express direction for the maintenance of the legatees, out of the interest of legacies, and there have been other children, the objects of the testator's bounty, such maintenance has been ordered without regard to the father's ability<sup>j</sup>.

i 3 Atk. 60.  
Vid. 3 Bro.  
Ch. Rep. 60.

j 3 Atk. 60.  
2 P. Wms. 21.

13 Vef. jun.  
733. Vid. also  
4 Bro. Ch.  
Rep. 223.

On occasions extremely urgent, the court will make a break in upon the principal; but this authority is exercised very sparingly, and with great caution. If the legacy be of small amount, and

m 2 P. Wms.  
21.



1 Vern. 255.  
2 P. Wms. 21.

4 Bac. Abr.  
441. 1 Ch. Ca.  
249. Prec. Ch.  
195.

1 Ves. 308,  
309.

2 Bro. Ch.  
Rep. 47. 3 Bro.  
Ch. Rep. 53.  
4 Bac. Abr. 440.  
is not.

the interest altogether inadequate to the necessities of the infant, the court will order a part of the principal to be immediately paid, and that as well for his education, as for his maintenance". But if the legacy be devised over in case of the infant dying before he comes of age, the principal, seems, shall on no account be subject to such diminution.

With respect to the *quantum* of the interest thus payable on a legacy, a distinction formerly prevailed between legacies charged on land, and such as were charged on the personal estate. It has been held, that as land never produces profit equal to the interest of money, the court of Chancery will follow the course of things, and give interest where it arises from land, one *per cent.* lower than where it arises from personal property"; but this distinction is now exploded. Whether legacies are charged on real or on personal estate, it is become the established practice to allow only four *per cent.* where no other rate of interest is specified by the will. And although pecuniary legacies not having the addition of the word "sterling," are to be paid according to the currency of the country where the will was made, yet the interest is to be computed, in conformity to the course of the court, four *per cent.* and not pursuant to the rate of interest in such country.

On the payment of a legacy an executor is bound to take a receipt for the same, properly stamped according

according to the value of the legacy, and the relationship of the legatee.

Vid. Append.

S E C T. IV.

*Of the ademption of a legacy.*

I PROCEED now to enquire into the nature of an ademption of a legacy.

An ademption of a legacy is the taking away or revocation of it by the testator. It may be either express, or implied. The testator may not only in express terms revoke a legacy he had before given, but such intention may be also indicated by particular facts.

As where a father makes a provision for a child by his will, and afterwards gives to such child, if a daughter, a portion in marriage, or if a son, a sum of money to establish him in life, provided such portion or sum of money be equal to or greater than the legacy, this is an implied ademption of it, for the law will not intend that the father designed two portions for the same child.

But this implication will not arise if the provision in the will is created by a bequest of the residue, or if the provision in the father's life-time be substituted to a contingency, nor unless it be *ejusdem generis* with the legacy; nor if the testator were a stranger. Such implication is always liable to be rebutted by evidence. But if the testator by a

a 2 Fonbl. 353.

b 2 Fonbl. 354.

not. (a) 1 P.

Wms. 680.

1 Ch. Rep. 83.

2 Vern. 113.

2 Vern. 257.

2 Atk. 216.

Ambl. 325.

1 Bro. Ch.

Rep. 307.

c 1 Atk. 216.

d 2 Atk. 491.

e 1 Bro. Ch.

Rep. 423.

f 2 Atk. 516.

2 Bro. Ch.

Rep. 499.

g 2 Atk. 516.

2 Bro. Ch.

Rep. 265, 519.

codicil, subsequent to the portioning or advancement of the child, ratify and confirm his will, this although a new publication, shall not avail to overturn the presumption that he meant to adeem the legacy; for such words are merely formal<sup>h</sup>.

In respect to the adeption of a legacy, all the cases on the subject concur in the principle, that the intention of the testator must govern; but, in the application of that principle, or what shall amount to evidence of such an intention, they are in many instances, incapable of reconciliation.

Thus, in some cases, it has been held, that where a sum of money is bequeathed out of a particular fund, such legacy is in its nature general, a *legatum in numeratis*, and, if the testator in his life-time receive it, it must be made good to the legatee out of the general assets; for, from the act of the testator, no presumption can be raised of his intention to revoke his bounty<sup>i</sup>. In other cases it has been decided, that such a legacy under the same circumstances is adeemed<sup>k</sup>. Some authorities distinguish between the bequest of a sum of money, to be satisfied out of a particular fund, and consequently a general legacy, and a bequest of a specific debt, that the former is not adeemed while the latter is adeemed, by payment to the testator<sup>l</sup>. But these last mentioned cases differ in their construction of what shall be the bequest of a general legacy, as opposed to that of a specific

<sup>i</sup> 4 Bac. Abr. 355. 2 Bro. Ch. Rep. 108. Finch. 152. Raym. 335. 1 P. Wms. 777.

<sup>k</sup> 3 Bro. Ch. Rep. 431. See also 2 Famb. 367. not (f.)

<sup>l</sup> Ambl. 401.



debt. Some, as we have already seen<sup>m</sup>, adopt a distinction between the bequest of a certain sum of money due from a particular person, as "five hundred pounds due on a bond from A.," and a bequest of such debt generally, as, "of the bond from A.; that, in the former instance, the legacy is pecuniary, in the latter is specific". But, according to other cases, this distinction is too tender to be relied on<sup>n</sup>. A difference has also, in some instances, been taken between a compulsory and a voluntary payment to the testator of such debt; in other words, where the testator himself calls in a debt, which he has bequeathed, and where the debtor, unprovoked and without application, thinks fit to pay it; that, in the former instance, it is the act of the testator, and consequently an ademption, in the latter he is merely passive, and, therefore, cannot be presumed to have changed his mind<sup>p</sup>. But the doctrine of some cases is, that this distinction has no weight, and of others, that it has no existence<sup>q</sup>, and that the case is not varied by the mode of payment. In another class of cases, this distinction between a compulsory and a voluntary payment has been recognised as very important, but not as an absolute rule of decision, on the principle, that the testator's calling for payment is not of itself sufficient evidence of an intention to adeem, but an equivocal act requiring explanation<sup>r</sup>.

It is, however, clear, that if the legacy be of a specific chattel, and the testator alter the form, so

<sup>m</sup> Vid. *supr.*

<sup>n</sup> 237.

<sup>p</sup> 2 P. Wms.

<sup>q</sup> 330. and not. 1.

<sup>r</sup> *ibid.* Ambl. 566.

Carteret v.

Lord Carteret,

cited 2 Bro.

Ch. Rep. 114.

<sup>o</sup> 2 Bro. Ch.

Rep. 111 1 Eq.

Ca. Abr.

<sup>p</sup> 2 P. Wms.

<sup>q</sup> 330 not. (1.)

<sup>r</sup> *ibid.* Ambl. 57.

<sup>s</sup> 1 P. Wms.

461. 3 P. Wms.

386. 2 P. Wms.

469. 28tra. 823.

<sup>t</sup> Ambl. 566.

<sup>u</sup> 2 Bro. Ch.

Rep. 109.

<sup>v</sup> 4 Bac. Abr.

355. not. (b)

<sup>w</sup> 1 Ves. 623.

Ambl. 401.

<sup>x</sup> 2 Ves. jun. 639.

t 3 Bro. Ch.  
Rep. 110.

u 3 Bro. Ch.  
Rep. 108.

x Ca. Temp.  
Talb. 226.

y Ca. Temp.  
Talb. 226.

as to alter the specification of the subject, as if, after having giving a gold chain by his will, he convert it into a cup, or, after he has bequeathed wool, he make it into cloth, or a piece of cloth into a garment; the most obvious conclusion that can be formed from such an act is, that he has changed the intention he had expressed in his will; therefore, in such instances, the legacy shall be adeemed<sup>t</sup>. So, if he bequeath his stock in a particular fund, and sell it out subsequent to the making of the will, this, on the same principle, amounts to an adeption<sup>u</sup>. But, if A. bequeath so much stock to B., and, after making his will, sell it out, and then buy in again the same quantity of stock, this is no adeption; for, if the selling of the stock is evidence of his having altered his intention, his buying in again is evidence equally strong, that he meant the legatee should have it<sup>x</sup>. If the testator, after such bequest of stock, sell out part, and die, such sale shall be an adeption *pro tanto*<sup>y</sup>. Thus where A. bequeathed a moiety of two-thirds of the residue of his South Sea stock, India, Bank, and Orphan stock, lease East India and South Sea bonds, and other his personal estate to B.; B. before he received the legacy made his will, and devised this moiety of trustees, to sell and pay out of the same the sum of two hundred pounds to C., and the residue of the money to D: Afterwards B. and the legatee of the other moiety coming to an account with the executor of A., their respective shares were set out and received, and the stock and bonds were

allotted

allotted to B, who sold part of them in his lifetime, but kept no account of the produce: This was decreed to be an ademption of the legacy to D. *pro tanto*. But it was held, that B.'s receipt of his share was clearly no ademption; inasmuch as the object both of B. and the other legatee was merely to ascertain their moieties, and to prevent survivorship<sup>2</sup>.

<sup>2</sup> Mos. 373.

So it has been decided, that a bequest of a debt shall not be adeemed by the testator's receiving dividends upon it under the bankruptcy of the debtor<sup>3</sup>.

<sup>3</sup> 2 Bro. Ch. Rep. 108.

## SECT. V.

### *Of cumulative legacies.*

LEGACIES may be also cumulative: they are contradistinguished from such as are merely repeated. As where a testator has twice bequeathed a legacy to the same person, it becomes a question, whether the legatee be entitled to both or to one only. And on this point likewise the intention of the testator is the rule of construction<sup>4</sup>.

<sup>4</sup> 4 Bac. Abr. 361. 1 Bro. Ch. Rep. 389.

On this head there are three classes of cases; first, those cases in which there is no evidence of such intention, either internal or extrinsic, one way

<sup>5</sup> 2 Bro. Ch. Rep. 537.

or



or the other; those cases where there is internal evidence; and also those in which there is extrinsic evidence.

In regard to the first, where there is neither internal, nor extrinsic evidence, it is necessary to recur to the rule of law<sup>b</sup>. There are four instances of this class.

<sup>b</sup> Hooley v. Hatton, 1 Bro. Ch. Rep. 391. in not.

Where the same specific thing is bequeathed A. twice in the same will, or in the will, and again in a codicil: in that case he can claim the benefit only of one legacy, because it could be given no more than once<sup>c</sup>.

<sup>c</sup> 1 Bro. Ch. Rep. 392, in not. & *ibid.* 393.

Where the like quantity is bequeathed to him twice, by one and the same instrument; there also he shall be entitled to one legacy only<sup>d</sup>.

<sup>d</sup> 1 Bro. Ch. Rep. 392. in not. Swinb. p. 7. s. 21.  
1 Bro. Ch. Rep. 30 in not.  
4 Bac. Abr. 361. 1 P. Wms. 244.

Where the bequest to him is of unequal quantities in the same instrument; the one is not merged in the other, but he has a right to them both<sup>e</sup>.

<sup>e</sup> 1 Bro. Ch. Rep. 392. in not. Vid. 2 Bro. Ch. Rep. 521.

And, lastly, where the bequest to him is of equal or unequal quantities by different instruments: in that case also there shall be an accumulation<sup>f</sup>.

<sup>f</sup> 1 Bro. Ch. Rep. 391. and 392. in not. 1 P. Wms. 423. 1 Ch. Ca. 361.

There are likewise cases in which there is internal evidence of the testator's intention; as where a latter codicil appears to be merely a copy of the former with the addition of a single legacy, or where both legacies are given for the same cause; the

shall not be cumulative, whether given by the same, or different instruments, as they shall be where one is given generally, and the other for an express purpose; or where one reason is assigned for the former, and another for the latter. In like manner it may be collected from the context, whether the testator meant a duplication, or a mere repetition of the first bequest. And his intention has been inferred from very slight circumstances.

f 4 Bac. Abr.  
361. 2 Atk. 640.  
1 Bro. Ch. Rep.  
389. 2 Bro. Ch.  
Rep. 321.  
1 P. Wms. 424.  
not. (a.)

Extrinsic evidence is also admissible on this subject. Whether the testator by giving two legacies did, or did not, intend the legatee to take both, is a question of presumption, which will let in every species of proof. Hence, if the testator, after the making of the will, and before the date of the codicil, had an increase of fortune, that circumstance has been held to prove that he intended an additional bounty.

g 2 Bro. Ch.  
Rep. 327. 328.  
4 Bac. Abr.  
361. in not.

h 1 P. Wms.  
424.

## SECT. VI.

### *Of a legacy's being in satisfaction of a debt.*

UNDER certain circumstances, a legacy is recorded in the light of a satisfaction of a debt. On this point also, the intention of the testator is the criterion.

a 4 Bac. Abr.  
362. 1 Salk.  
155. pl. 3.  
2 Salk. 508.  
2 Fonbl. 3326

It

b 1 P. Wms.  
409 not. (1.)  
Prec. Ch. 394.  
2 P. Wms. 132.  
3 P. Wms. 353.  
1 Vef. 126.

It is a general rule, that a legacy given by debtor to his creditor, which is equal to, or greater than the debt, shall be considered as satisfaction of it <sup>b</sup>.

c 1 P. Wms.  
409 not. (1.)

But this is merely a rule of construction, and the courts in a variety of instances have denied the application of it, where they have been able to collect from the will circumstances to repel the presumption <sup>c</sup>. As where it contains an express direction for the payment of debts <sup>d</sup>, or, if the legacy be less than the debt, it has been held not to go in discharge, nor even in diminution of it <sup>e</sup>.

d 1 P. Wms.  
410. 3 Atk. 66.  
68. Sed vid.  
Gaynor v.  
Wood, at the  
Rolls, cited  
1 P. Wms. 409.  
not. (1.) &  
4 Bac. Abr.  
428.

e 2 Salk. 508.  
2 Vern. 478.  
2 P. Wms. 616.  
Mos. 295.

Nor shall the legacy be a satisfaction, if it be conditional, or given on a contingency, for it shall not be supposed, that the testator intended an uncertain recompence in satisfaction of a certain demand <sup>f</sup>. Nor is a legacy considered as a satisfaction, where it is not equally beneficial with the debt in one respect, though it may be more so in another; as, where the legacy is to a greater amount, but the payment of it is postponed for however short a period <sup>g</sup>: nor shall a legacy be held to be in satisfaction of a covenant, unless it be equally beneficial in amount, certainty, and time of enjoyment with the thing contracted for <sup>h</sup>.

f 2 Fonbl. 331.  
Prec. Ch. 394.  
2 Salk. 508.  
2 Atk. 300. 491.  
2 P. Wms. 555.  
1 Vef. 519.

g Prec. Ch. 336.  
2 Vern. 478.  
2 Atk. 300.  
3 Atk. 96.  
1 Bro. Ch. Rep.  
129. 1 Bro. Ch.  
Rep. 295.  
2 Fonbl. 331.  
not. (m.) 2 Vef.  
635. 1 P. Wms.  
409. not. (1.)

h 1 P. Wms.  
324. 409. not.  
(1.) 2 P. Wms.  
614. 2 Fonbl.  
332 not. (o.)  
1 P. Wms.  
299.

Nor if the debt were on an open or running account, so that the testator could not tell, whether the balance was in favour of the legatee or not. Nor if the debt were contracted after the making



the will in which the legacy is given, shall he be supposed to have had it in contemplation to satisfy debt that was not then in existence<sup>a</sup>.

<sup>a</sup> 2 Fonbl. 331.  
332. 2 Salk.  
308. 1 P. Wms.  
409. 2 P. Wms.  
344. 3 P. Wms.  
353.

But in all cases the legacy shall be construed as satisfaction, in case there be a deficiency of assets.

# S E C T. VII.

*of the abatement of legacies—of the refunding of legacies—of the residuum.*

IN case the estate be sufficient to answer the debts and specific legacies, but not the general legacies, they are subject to abatement, and that in equal proportions; but in such case, nothing shall be abated from specific legacies<sup>a</sup>.

<sup>a</sup> 2 Fonbl. 374.  
<sup>a</sup> Bl. Com. 513.  
<sup>i</sup> P. Wms 679.

Nor shall a sum of money bequeathed by the testator in satisfaction, or recompence of an injury done by him, abate any more than a specific legacy<sup>b</sup>. But a legacy, although devised to be paid in the first place, shall abate, if the fund be insufficient for the legacies<sup>c</sup>, unless, perhaps, it be a provision for a wife<sup>d</sup>. So a devise of a personal equity is not, as we have seen<sup>e</sup>, a specific legacy, but a legacy of quantity, and liable to abate accordingly<sup>f</sup>.

<sup>b</sup> 2 Fonbl. 377.  
<sup>c</sup> 2 Fonbl. 378.  
<sup>i</sup> Vern. 31.  
<sup>d</sup> 2 Vef 417.  
<sup>e</sup> Vid. *supr.* 237.  
<sup>f</sup> 3 Atk. 693.  
2 Vef. 417.  
Sed *vid.* 1 Vef.  
133.

If

If A. devise specific and pecuniary legacies, and direct by the will that such pecuniary legacies shall come out of all his personal estate, if there be no other personal estate than the specific legacies, they must be intended to be subject to those which are pecuniary, otherwise the bequest to the pecuniary legatees would be altogether nugatory<sup>k</sup>. So a legacy in favour of a charity, although preferred by the civil law, shall by our law abate equally with other general legacies<sup>h</sup>.

g Prec. Ch. 393.  
h Fonbl. 377.  
378.

h 1 P. Wms.  
265. 462. 675.  
i P. Wms. 25.

But in case of a deficiency of general assets, that is to say, of assets to pay debts, specific legacies, although not liable to abate with the general legacies, must abate in proportion among themselves.

i 1 Fonbl. 377.  
not. (g)  
j P. Wms. 381.  
k P. Wms. 403.  
l Vern. 111.

k Vid. supr.  
236.

l 1 Vel 563.

We have before seen<sup>k</sup>, that a testator may charge specific legacies out of a specific chattel; now, in such case, if the chattel so parcelled out prove deficient, such specific legacies must abate proportionally among themselves<sup>l</sup>.

Such is the advantage to which a specific legatee is entitled, that he shall not contribute with the other legatees in case of a deficiency. But on the other hand he is subject to a risque; as for example, if such specific legacy be a lease, and there be an eviction; or, if goods, they be mislaid, or burnt, or, if a debt, it be lost by the insolvency of the debtor; in all these instances such specific legatee shall receive no contribution<sup>m</sup>.

m 1 P. Wms.  
540.

On the same principle, legatees in certain circumstances are bound to refund their legacies; or a rateable part of them, as in all cases of a deficiency of assets for the payment of debts". If the fund be merely insufficient to pay the legacies, and the executor pay one of the legatees, a distinction is to be remarked between cases, where such payment was voluntary, and where it was compulsory; and also between cases in which the assets were originally deficient, and where they became so by his subsequent misapplication of them. If the executor paid the legacy voluntarily, the law presumes, that he has sufficient to pay all the legacies, and the other legatees can resort only against him. The legatee, who has been paid, is subject to no claim on the part of the other legatees<sup>o</sup>; provided, according to some authorities<sup>p</sup>, the executor be solvent; but if the executor prove insolvent, so that there are no other means of redress, the court will entertain a bill, to compel such legatee to refund.

n 2 Bl. Com.  
513. 1 Vern 94.  
2 Vent. 360.

o 2 Vef. 194.  
2 Vern. 203.  
p 2 Vef. 194.

In case the assets appear to have been originally sufficient, if the executor, either voluntarily or by compulsion, pay one of the legatees, the rest shall make him refund in proportion. And, even if such legatee obtain a decree for his legacy, and be paid, the other legatees may oblige him to refund in the same manner. But if the executor had at first enough to pay all the legacies, and, by his subsequent wasting of the assets, they become deficient, in that case such legatee shall not be compelled to refund,



refund, but shall retain the benefit of his legal diligence in preference to the other legatees, who neglected to institute their suit in time; by which they might have secured to themselves the same advantage.

q 1 P. Wms.  
495. not. (1.)  
2. P. Wms. 446.

Not is a legatee bound to refund at the suit of the executor, unless the payment by him were compulsory, or unless the deficiency were created by debts, which did not appear till after the payment of the legacy: in either of which cases, the executor as well as a creditor, may compel the legatee to refund the legacy; for an executor who pays a debt out of his own purse stands in the place of a creditor, and has the same equity against such legatee.

t 4 Bac. Abr.  
428. Vin Abr.  
tit. Devise,  
(Q. d).

u 2 Bl. Com.  
314. 4 Bac.  
Abr. 428.

w Carth. 52.

When the executor has paid all the debts, and all the legacies above mentioned, pecuniary, and specific, he must in the last place pay over the surplus, or residuum to the residuary legatee. And although the residuary legatee die before payment of the debts, and before the amount of the surplus is ascertained, yet it shall devolve on his representative.

If A. bequeath all the surplus of his personal estate, after payment of the debts, and legacies to J. S. and several creditors, although barred by the statute of limitations, commence actions against the executor, on his refusal to plead the statute.

equity will not in favour of such residuary legatee  
compel him to plead it<sup>a</sup>.

<sup>a</sup> 4 Bac. Abr.  
429. 1 Eq. Ca.  
Abr. 305.  
11 Vin. Abr.  
169. Prec.  
Chan. 100.

### S E C T. VIII.

*Of an executor's being legatee: and herein of his assent to his own legacy.*

IN case of a legacy bequeathed to the executor, if he take possession of it generally, he shall hold it as executor, which is his first, and general authority<sup>a</sup>.

<sup>a</sup> 3 Bac. Abr.  
84. 10 Co. 47.  
Plowd. 520.  
543. 10 Co.  
47. b. Dyer  
277. b. Stra. 70,  
<sup>b</sup> Off. Ex. 224.

The union of the two characters, of executor and legatee, in one and the same person, makes no difference<sup>b</sup>. His assent is as necessary to a legacy's vesting in him in the capacity of legatee, as to a legacy's vesting in any other person, and that on the same principle. Till he has examined the state of the assets, he is incompetent to decide whether they will admit of his taking the thing bequeathed as a legacy, or whether it must not of necessity be applied in satisfaction of debts<sup>c</sup>.

<sup>c</sup> Off. Ex. 27.  
28.

His assent to his own legacy may, as well as his assent to that of another legatee, be either express, or implied. He may not only in positive terms announce his election to take it as a bequest, but such election may also be implied from his language

d Com. Dig.  
Admon. C. 6,  
7. 1 Lev. 25.  
e 1 Lev. 25.

f 1 Lev. 25.

g 1 Roll. Abr.  
920.

h 1 Roll. Abr.  
619.

i Semb.  
1 Leon. 216.

k Plowd 544.

l Plowd. 539.

m Dyer, 277. b.

n 2 Roll. Rep.  
158.

guage, or his conduct<sup>d</sup>. As if he say, that he will have it according to the will, that amounts to an assent to have it as legatee<sup>e</sup>. So, if a term be devised to A. the executor for life, and afterward to B., if he say that B. will have it after him, that implies an election to take it as legatee<sup>f</sup>. So, if by deed reciting, that he has a term for years by devise, he grants it over<sup>g</sup>; or, if he take the profits of it to his own use<sup>h</sup>, or, if he repair the tenements devised at his own expence<sup>i</sup>; all these acts indicate an assent to the bequest: In like manner, if he perform a condition or trust annexed to the devise; as, if a lessee for years devise his term to his executor, on condition that he shall pay ten pounds to J. S., which he pays accordingly; this payment amounts to an election on his part to take the lease as a legacy, and it is in law an execution of the legacy for ever; for he who performs the charge of a thing claims the benefit which is annexed to it<sup>k</sup>. So, if a lease be devised to an executor during the minority of the testator's son, in order that the executor may educate him out of the profits, if he educate him accordingly, this constitutes an assent to take the lease by way of legacy, and not as executor<sup>l</sup>. or if he exclude a co-executor from a joint occupancy of the term with him<sup>m</sup>, that is also an agreement to the legacy. An assent to take part as a residuary legatee, is an assent also to take the whole residue in the same character<sup>n</sup>.



But, till the executor has made his election either express or implied, he shall take the legacy as executor, though all the debts have been paid independently of such bequest.

o Com Dig.  
Admon. C. 5.  
1 Leon. 216.

Nor is the entry of an executor whether before or after probate on the term devised to him, an election to take it as legatee. Nor, if he merely say, that the testator left all to him, will so ambiguous an expression have that effect. Yet, if an executor, being also devisee of a term, grant a lease of it by the name of executor, that amounts to a claim in such capacity.

p Com. Dig.  
Admon. C. 7.  
Off. Ex. 226.  
q 1 Roll. Abr.  
620.

r 1 Leon. 216.

If a legacy be left to A. as executor, whether expressly for his care and trouble or not, he must either act, or distinctly shew his intention to act, before he shall become entitled to it.

a 3 Bro Ch.  
Rep. 95.  
3 Vef. jun. 148.  
4 Vef. jun. 212.

The rules above stated in respect to the abatement and refunding of legacies in the case of legatees in general, apply equally to the case where the same person is both executor and legatee, and although the bequest were merely as a recompence for his executing the trust.

t Plowd.  
545. in not.

u 4 Bac. Abr.  
437. 2 Vern.  
434.

## S E C T. IX.

*Of the testator's appointing his debtor executor—  
When the debt shall be regarded as a specific  
bequest to him—When not.*

IF a creditor appoint the debtor his executor such appointment shall operate as a release, and extinguishment of the debt, on the principle, that from that act of the testator it may be reasonably inferred that such was his meaning. The debtor under these circumstances, is considered in the nature of a specific bequest or legacy to the debtor for the purpose of discharging the debt<sup>a</sup>. Thus if the obligor of a bond make the obligee executor, this amounts to a release of the debt<sup>b</sup>. If several obligors be bound jointly, and severally and the obligee constitute one of them his executor, it is an extinguishment of the debt, and the executor is incapable of suing the other obligors. The debt is also released, where only one of several executors is indebted to the testator<sup>c</sup>; and after the death of such executor, the surviving executors cannot sue his representative for the debt<sup>d</sup>. Nor is the case varied by the executor dying without having proved the will, or having administered<sup>e</sup>, or even by his refusal to act with his co-executors<sup>f</sup>, unless he formally renounces the office in the spiritual court: such a renunciation, indeed, shall prevent the release of his debt for he could no more be compelled to accept a release, than a deed of grant<sup>g</sup>.

<sup>a</sup> 3 Bac. Abr.  
11. 2 Bl. Com.  
511, 512. Off.  
Ex. 31. Salk.  
299. Plowd.  
186. Com. Dig.  
Admon. B. 5.  
Roll. Abr.  
920, 921. 5 Co.  
30. Hargr. Co.  
Litt. 264 b.  
not. r.

<sup>b</sup> 8 Co. 136.  
<sup>c</sup> Off. Ex. 31.  
31 Vin. Abr.  
398.  
<sup>d</sup> Off. Ex. 31.

<sup>e</sup> Off. Ex. 32.  
Plowd. 264.  
Leon. 320.

<sup>f</sup> Salk. 300.  
Plowd. 184.  
Off. Ex. 31.

<sup>g</sup> Salk. 308.

<sup>h</sup> Salk. 307.

In all these cases the remedy is destroyed by the act of the party, and, therefore, is for ever gone<sup>1</sup>; but the effect is different where it is suspended merely by the act of law<sup>2</sup>, and where, consequently, there is no room to infer any intention on the part of the deceased to release the debt; as, if administration of the effects of a creditor be committed to the debtor, this is only a temporary privation of the remedy by the legal operation of the grant<sup>3</sup>. Thus, if the obligor of a bond administer to the obligee, and die, a creditor of the obligee, having obtained administration *de bonis non*, may maintain an action for such debt against the executor of the obligor<sup>4</sup>. So, if the executrix of an obligee marry the obligor, such marriage is no release of the debt, for the testator has done no act expressive of an intention to discharge it, and the husband may pay it to the wife in the character of executrix. If he do not, the remedy is suspended merely by the legal effect of the coverture, and after her death, the administrator *de bonis non* of the testator will be equally entitled to that debt, as to any others outstanding<sup>5</sup>.

<sup>1</sup> i Cro. Car. 373.  
<sup>2</sup> Salk. 302.  
<sup>3</sup> Ventr. 303.  
<sup>4</sup> Salk. 303.

<sup>1</sup> Off. Ex. 32.  
<sup>2</sup> Co. 136.

<sup>m</sup> Sid. 79.

<sup>n</sup> Leon. 310.  
Moore 236.  
Salk. 306.

<sup>o</sup> Salk. 302.  
306. Off. Ex.  
31. 2 Bl. Com.  
512. Plowd.  
186.

Nor will the law suffer such an intention of the testator to be carried into effect, where he has not a fund sufficient for the payment of his own debts, and, in that case, the debt of his executor shall affect. It were highly unreasonable that the claims of creditors should be defeated by a release, which was absolutely voluntary<sup>6</sup>. Such discharge, however, shall in general be preferred to legacies.



For, as I have already observed, the debt is considered in the light of a specific bequest to the debtor, and, therefore, though like all other legacies, it shall not be paid or retained till the debt is satisfied, yet the executor has a right to it exclusive of the other legatees<sup>p</sup>.

p 2 Bl. Com.  
512. Hargr.  
Co. Litt. 264.  
b. not. 1.

Nor shall such debt be released even as against legatees, if the presumption arising from the appointment of a debtor to the executorship, contradicted by the express terms of the will; by strong inference from its contents. As where a testator leaves a legacy, and directs it to be paid out of a debt due to him from the executor; such debt shall be assets to pay not merely that specific legacy, but all other legacies<sup>q</sup>. In like manner, where he leave the executor a legacy, it is held to be a sufficient indication, that he did not mean to release the debt. And, in such case, the executor shall be trustee to the amount of the debt for the residue of the legacy, or the next of kin<sup>r</sup>. So, where a testator bequeathed large legacies, and also the residue of his estate to his executors, one of whom was indebted to him by bond in three thousand pounds, it was decreed that this debt should be added to the surplus, and that both executors were equally entitled to it<sup>s</sup>. It seems, also, that the naming of a debtor executor, *durante minoritate*, is no discharge of the debt; since he is executor in trust for the infant, till he comes to age<sup>t</sup>.

q 3 Bac. Abr.  
21. Yelv. 160.

r Carey v.  
Goodinge,  
3 Bro. Ch.  
Rep. 110.

s Ca. Temp.  
Talbot, 240.  
3 Bac. Abr. 12.

t 11 Vin. Abr.  
400. Lord.  
Raym. 605.

SECT. X.

*Of the residue undispensed of by the will, when it shall go to the executor—When not.*

IF the testator make no disposition of the residue, a question arises, to whom it shall belong, and this is a subject which involves in it a great variety of distinctions.

The result of the numerous cases on this subject appears to be this:

2 1 P. Wms.  
550. note (1.)  
2 Fenbl. 131:  
not. (k.) 3 Bac.  
Abr. 67. 11  
Vin. Abr. 407.

The whole personal estate of the testator is, in point of law, devolved on the executor; and if, after payment of the funeral expences, testamentary charges, debts, and legacies, there shall be any surplus, it shall vest in him beneficially.

It shall appear on the face of the will, either expressly, or by sufficient implication, that the testator meant to confer upon him merely the office, and not the beneficial interest, equity will convert the executor into a trustee for those on whom the law would have cast the residue in case of a complete intestacy; that is to say, the next of kin, where the testator has styled him in his will an executor in trust, or has used other expressions of the same import. So, where the testator has begun to make a disposition of the surplus, but

2 1 P. Wms.  
550. note 1.  
2 Vern. 99.  
2 P. Wms. 158:  
2 Ack. 18.  
2 Bro. Ch.  
Rep. 634.  
3 Bro. Ch.  
Rep. 18. Mose-  
ly 188. 301.  
1 Vcl. jun. 63.

u 1 P. Wms.  
550. not. 1.  
Mosely 288.  
2 Vef. 91. 495.  
2 Vef. jun. 78.

w 1 P. Wms.  
550. not. 1.  
Ambl. 769.  
3 Bro. Ch.  
Rep. 28.

x 2 Fonbl. 131.  
not. k. 2 Vef.  
97. 1 Vern.  
473. 2 P. Wms.  
157. 2 Vern.  
148. 2 Atk. 46.

y 1 P. Wms.  
550. not. 1.  
2 Fonbl. 131.  
not. k. 2 Vern.  
676. Bunb.  
112. 1 P. Wms.  
544. 3 P. Wms.  
40. Prec.  
Chan. 107.

z 2 Vern. 425.  
3 Atk. 226.  
1 Bro. Ch.  
Rep. 154.  
2 2 Fonbl. 131.  
not. k. 1 Vern.  
361. Mosely  
288. 2 Vef.  
161. 1 Vef.  
jun. 66. in not.

has not proceeded to complete it, there, also, the executor shall be excluded. As where a residuary clause is inserted in the will, and the testator has omitted to name the residuary legatee. Nor, where the testator has regularly bequeathed the surplus, although the residuary legatee first die, and consequently it be undisposed of at the time of the testator's death, shall it belong to the executor. No shall the executor be entitled to it where the testator has given him a legacy expressly for his care and trouble, for that is a strong case on which to raise a resulting trust, not merely on the absurdity of supposing a testator to give a part of the fund to that person, for whom he intended the whole; but, as it is evidence, that he considered him as a trustee for some other, who should be the object of the care and trouble, for which the bequest was meant as a compensation. Still, however, the principle, that it shall not be presumed to have been the testator's meaning thus to give part and all to the executor, has been allowed alone and unaided, to operate as an exclusion. Hence it is a settled rule in equity, that a pecuniary legacy bequeathed to an executor, affords a sufficient argument to debar him of the residue.

If the legacy to the executor be specific, it shall equally exclude him. Nor will the rule be varied by the testator's having bequeathed legacies to the next of kin. For it is founded rather on an implied intent to bar the executor, than to create a trust for the next of kin; and, therefore



if the executor have a legacy, and there be no next of kin, a trust shall result for the crown<sup>b</sup>. It is also settled, that in case the widow of the testator be executrix, she is, in respect to the residue, precisely in the same situation as any other person appointed to the office<sup>c</sup>; unless the bequest to her of a specific legacy consisting of property which was her's before marriage, may vary the rule<sup>d</sup>.

b 1 Bro. Ch. Rep. 101.  
c 1 P. Wms 115. 350. note 1. 2 Fonbl. 130. not i. Ambl 116. 2 Eq. Ca. Abr. 444. 1 Bro. Ch. Rep. 154.  
d 2 Fonbl. 130. not. i. 7 Bro. P. C. 511.

In respect to that class of cases, in which the executor shall be entitled to the residue, although he be a legatee, it may be stated as an universal rule, that wherever the legacy is consistent with the intent, that the executor should take the whole, a court of equity will not disturb his legal right. And, therefore, where a gift to an executor is only an exception out of another legacy; as if a library be bequeathed to A., out of which the executor is to select ten books for himself; it shall not exclude him from the residue, inasmuch as it was necessary to make an express exception<sup>e</sup>. Nor where the executorship is limited to a particular period, or determinable on a contingency, and the legacy to the executor, at the end of such period, or on such contingency's taking place, is bequeathed over, shall it defeat his claim to the surplus<sup>f</sup>. Nor shall a gift of only a limited interest for the life of the executor have that effect<sup>g</sup>. Nor in these cases the legacy is considered as an exception out of the general gift to the devisee over, and therefore not such a legacy as shall ex-

e 1 P. Wms. 550. not. 1. Prec. Chan. 231. 2 Eq. Ca. Abr. 444. pl. 58. 2 Atk. 45. 3 Atk. 229. Vid. also 7 Bro. P. C. 511.  
f 2 Fonbl. 131. not. k. Prec. Chan. 263.  
g 2 Fonbl. 132. not. k. 1 P. Wms 114. Prec. Chan. 316. 1 Ves. jun. 356.

clude

h 1 P. Wms.  
116. not. 1.

i Vid. Prec.  
in Chan. 264.

k 2 Fonbl. 135.  
not. 1. 2 P.  
Wms. 138.  
160, 210.  
2 Vef. 28.

1 Vef. jun. 358.

1 2 P. Wms.  
209. 1 Vef. jun.  
359.

clude the executor from the residue, since it does not involve the absurdity of giving expressly a part where the whole was intended to be given<sup>1</sup>. But the limited executor has an interest in the residue only while his executorship continues, on the determination of which it devolves on the general executor<sup>1</sup>.

That parol evidence may be received for the purpose of rebutting a resulting trust, is sufficiently established by a series of cases; but it is admitted with great caution<sup>2</sup>, and restricted to what passed at the time of making the will<sup>1</sup>.

## CHAP. VI.

OF THE INCOMPETENCY OF AN INFANT EXECUTOR—  
OF THE ACTS OF AN EXECUTOR DURANTE MINORI-  
TATE—OF A MARRIED WOMAN EXECUTRIX—OF CO-  
EXECUTORS—OF EXECUTOR OF EXECUTOR—OF EXE-  
CUTOR DE SON TORT.

**A**N infant, as it has been already stated<sup>a</sup>, is <sup>a</sup> *Supr. 11, 73.*  
now, by the stat. 38 *Geo. 3. c. 87.* incapable  
of the functions of an executor, till he shall have  
attained his full age of twenty one years. Nor be-  
fore the passing of this statute was an infant com-  
petent to act, till he had arrived at the age of se-  
venteen<sup>b</sup>; but at that age he had a right to assume  
the executorship. He had authority to sell the  
testator's effects, to pay and receive debts, to assent  
to, and pay legacies, and, generally, to discharge  
the duties which belong to the representative of the  
deceased<sup>c</sup>. Yet if an infant executor, after the age  
of seventeen, and before the age of twenty-one  
years, released a debt due to the testator without  
actually receiving it, such a release was held to be  
void: or, if he received only a part of it, it was  
void for the remainder; for otherwise he would  
have been divested of that privilege, which the law  
allows to all infants, of rescinding their acts when  
they are manifestly to their disadvantage. Nor  
could

<sup>b</sup> Off. Ex. 314.  
<sup>1</sup> Roll. Abr.  
730. Sed vid.  
Cro. Eliz. 254.  
<sup>3</sup> Leon. 143.  
Keilw. 51.  
<sup>2</sup> Saund 212.  
<sup>1</sup> Bl. Com. 463.

<sup>c</sup> 3 Bac. Abr. 2.  
Off. Ex. 215.  
217, 218.  
Com. Dig.  
Admon. E.

d 3 Bac Abr. 8.  
5 Co. 27. Off.  
Ex. 217, 218.  
Com. Dig.  
Admon. E.  
Moore 46.  
Cro. Eliz. 671.  
Cro. Car. 490.  
e Off. Ex. 217,  
215.  
f 1 Vern. 328.

g 3 Bro. Ch.  
Rep. 195.

could a proceeding prejudicial both to the infant, and to the estate, be regarded as pursuant to his office<sup>d</sup>. On the same principle the assent of such infant executor to a legacy did not bind him, unless he had assets for the payment of debts<sup>e</sup>. Nor had he a power of committing any other act which might involve him in the consequences of a devaluation<sup>f</sup>. Nor, in a late case, would the court of chancery direct money to be paid to an infant executor, although he had attained the age of seventeen; but referred it to a master to inquire, whether there were any debts or legacies, and to consider of a maintenance<sup>g</sup>.

But these distinctions it is now needless to discuss, the statute having altogether disqualified an infant executor from exercising the office during his minority, and having directed administration with the will annexed, to be granted to some other person

h Vid. *supr.* 12, in the interim<sup>h</sup>.  
73.

i Off. Ex. 215,  
216. Com. Dig.  
Admon. F.

If A. appoint B., an infant, his executor, and C. executor during the minority of B. C. though only a temporary executor, seems, during the continuance of his office, to be invested with the same powers as belong to an absolute executor; and although he be named in the will administrator only for the benefit of the infant<sup>i</sup>.

k *Supr.* 187.

In case a married woman be executrix, the husband, as we have before seen<sup>k</sup>, has a right to act in the administration with, or without her consent.



He is empowered to reduce into possession, or to dispose of the property by way of gift, sale, surrender, or release, to receive, and pay debts, to assent to, and pay legacies, and to elect for his wife to take as legatee". On the contrary, such acts, if performed by her without his permission, are of no validity". If the husband be abroad, the court of chancery will restrain the executrix from settling in the assets of the testator, and appoint a receiver for that purpose, with power to commence suits for the recovery of debts due to the estate".

m Com. Dig.  
Admon D  
Off. Ex. 207.  
208. 1 Salk.  
306.  
3 Bac. Abr. 9.  
Keilw. 112.  
Off. Ex. 107.  
208. Vid.  
Anderf. 117.  
1 Roll. Abr.  
924.  
2 Atk. 212.

And this doctrine is founded on the principle, that as he is personally responsible for such acts, the law makes it essential to their validity, that they should be performed by him, or at least with his concurrence: otherwise the misconduct of the wife in the executorship might be extremely prejudicial to the husband".

p Off. Ex. 207.  
208, 215.  
1 Fonbl. 84, 86.  
5 Co. 27.

Yet, if an executrix marry, and the husband disavow the goods, or is guilty of any other species of *devastavit*, it will be a *devastavit* also by the wife, and they will be both answerable accordingly". On the other hand, if an executrix commit *devastavit*, and then marry, the husband, as well as the wife, is chargeable for it during the coverture".

q Com. Dig.  
Admon. D.  
Cro. Car. 510.  
Dyer 210. in  
marg. 2 Bro.  
Ch. Rep. 323.  
r Com. Dig.  
Baron & Feme,  
N. Cro. Car.  
203. Moore  
761.

If the testator were indebted to the husband, or, which is the same thing, to the wife, before marriage, the husband may retain.

If

If the husband were indebted to the testator, the making of the wife executrix is equally a release of the debt, as if she had been the debtor; although if an executrix after the death of the testator marry such debtor, it will be a *devastavit*.\*

\* 1 P. Wms.  
350. not. 1. 2d.  
see Barnard.  
64.

t Vid. sup.  
16, 188.

u 3 Bac. Abr.  
30. Off. Ex. 95.  
2 Roll. Abr  
924. Com. Dig.  
Admon. B. 11.

w Dyer 13. b.

x Dyer 23. b.

y Dyer 24. b. in  
not.

If specific legacies are left to a husband and wife jointly, and they are named executors, such legacies shall exclude them from the residue, for they are analogous to a specific legacy to a sole executor†.

Co-executors, we may remember, are regarded in law as an individual person†; and by consequence, the acts of any one of them in respect to the administration of the effects, are deemed to be the acts of all: for they have a joint and entire authority over the whole property‡. Hence a release of a debt by one of several executors is valid, and shall bind the rest§. So a grant, or a surrender, of term, by one executor, shall be equally available. It has been likewise held, that if one confesses judgment, the judgment shall be against all¶. But on the contrary, where there were three executors, one of whom gave a warrant of attorney to confess judgment against himself and his co-executors, pursuant to which a judgment was entered against all the executors *de bonis testatoris*, for the debt, and against the executor who gave the warrant, *de bonis propriis*, for the costs; it was set aside, on the ground that executors may plead different pleas and that which is most for the testator's advantage

the

shall be received\*. If one executor grant or release his interest in the testator's estate to the other, nothing shall pass, because each was possessed of the whole before\*. It has been adjudged also, that if one of two executors appointed by the obligee deliver the bond to a stranger in satisfaction of a debt due from himself and die; although the debt as a chose in action could not pass by the assignment, yet by this delivery the party had such an interest in the instrument, that he might justify the detention of it as against the surviving executor<sup>b</sup>; but the law of this case seems very dubious, inasmuch as the debt not being assignable, could not pass by the delivery of the obligation\*.

<sup>a</sup> Stra. 20. Vid.  
<sup>10</sup> Mod. 323.  
<sup>1</sup> Ark. 460.  
<sup>a</sup> Godolph. 134.  
<sup>3</sup> Bac. Abr. 31.

<sup>b</sup> 2 Roll. Abr.  
46. Dyer 23. b.  
Cro. Eliz. 478.  
496.

<sup>c</sup> 3 Bac. Abr.  
31. in not.

One executor shall not be allowed to retain his own debt in prejudice to that of his co-executor in equal degree, but both shall be discharged in proportion\*.

<sup>d</sup> 2 Feubl. 407:  
not (l).  
<sup>11</sup> Vin. Abr. 71.

An assent to a legacy by one of several executors is sufficient\*. And if there be a devise to all the executors generally, one of them may assent for his part\*.

<sup>e</sup> Com. Dig.  
Admon. C. 2.  
Off. Ex. 225.  
<sup>f</sup> 1 Roll. Abr.  
618.

Co-executors, as well as a sole executor, shall be excluded from the residue, either in case the testator shall have expressly described them as mere trustees, or, according to the fair construction of the will, appears to have so considered them, or, in case he has made an imperfect disposition of the residue, as where he has inserted a residuary clause without

g 1 P. Wms. 7.  
& 550. not. 1.  
2 Fonbl. 133.  
in not.

without proceeding to specify the residuary legatee; or where he has bequeathed the surplus to a party, who died before him<sup>2</sup>.

h 2 Fonbl. 133.  
in not.

i 1 P. Wms.  
550. not. 1.  
Prec Chan.  
323. 4 Bro.  
P. C. 1. 2 Vef.  
91, 166, 167.  
2 Fonbl. 133.  
in not. 2 Atk.  
220.

k 1 P. Wms.  
550. not. 1.  
2 Atk. 69.  
1 Bro. Ch. Rep.  
328. 2 Fonbl.  
134. in not.  
2 Vef. 27.

l 1 P. Wms. 7.  
3 Bro. Ch.  
Rep 110.

m 1 P. Wms.  
550. not. 1.

But if a legacy be given to one executor expressly for his care and trouble, and no legacy given to his co-executor, it is a point unsettled, whether in such case they shall be barred of the residue<sup>1</sup>. This, however, is clear, that if there be two or more executors, a simple legacy to one shall not exclude them, for the testator may have intended a preference to him to that extent<sup>1</sup>. So, where several executors have unequal legacies, whether pecuniary or specific, they shall nevertheless be entitled to the surplus<sup>2</sup>. But where equal pecuniary legacies are given to co-executors, a trust shall result for the next of kin<sup>1</sup>. The arguments which have been urged in opposition to this rule, and to shew that the giving of equal pecuniary legacies to several executors, is not absolutely inconsistent with an intention that they should take the surplus, are, that such gift would secure to them a proportion of their legacies in the event of a deficiency of assets, which applies equally to the case of a *sole* executor; and, that they would take the legacies severally, whereas the residue would belong to them jointly. Yet the rule has long prevailed, as above stated<sup>2</sup>. No case, however, occurs in the books, in which distinct specific legacies of equal value to several executors have excluded them from the residue. And the argument, which supports the rule as to pecuniary, by no means applies with equal



equal force to specific legacies, since it is very probable, that a testator may wish to distribute specific quantities of stock, or particular debts among his executors in some particular manner, although equally in point of value, and consistently with an intention, that they should take the surplus<sup>1</sup>.

1 1 P. Wms.  
350. not. 1.  
2 Fenbl. 134.  
in not.  
in Supr. 282.

Nor does the case just mentioned<sup>m</sup>, of specific legacies bequeathed jointly to a husband and wife who are named executors, bear upon the point; for, as it was before observed, it is similar to that of a specific legacy to a sole executor<sup>n</sup>.

n 1 P. Wms.  
350. not. 1. ad  
fin. Barnard.  
64.

The power of an executor is not determined by the death of his co-executor, but survives to him; and therefore, it is held he may assent to a legacy<sup>o</sup>.

o Com. Dig.  
Admon. B. 12.  
3 Atk. 509.  
1 Vef. 9.

As a mediate or remote executor has the same interest in the effects of the original testator, as the immediate executor, he is invested with the same authority, and privileges, and is bound to administer such effects in the same manner<sup>p</sup>. But in cases of special trust confided to the executor within the ordinary limits of his duty, as to sell land, and the like, if it be not performed by the original executor, no successive executor as such, shall have authority for that purpose<sup>q</sup>.

p Com. Dig.  
Admon. G.  
Off. Ex. 257,  
258.

q Off. Ex. 258,  
259.

In respect to an executor *de son tort*, he may perform a variety of facts, which shall be as binding as those of a rightful executor<sup>r</sup>. As against creditors,

r 3 Bac. Abr. 25.  
Off. Ex. 120.

tors,

2 Off. Ex. 181,  
182.

2 2 Bl. Com.  
507. Dyer  
166. b.

3 3 Fac. Abr. 25.  
5 Co. 30.  
Off. Ex. 181.  
Carth. 104.  
Sid. 76.

tors, he is justified in paying the debts of the deceased', and indeed may be compelled to pay them so far as assets come to his hands'; and to an action brought against him by a creditor, he may plead *plene administravit*."

In case the rightful representative shall think fit to pursue his legal remedy against such an intruder, he has no defence; as, if it be by action of trover for the goods of the testator, the executor *de son tort* cannot plead payment of debts to the value, or that he hath given the goods in satisfaction of the debts; for he had no right to interfere.

w Com. Dig.  
Admor. C. 3.  
3 Fac. Abr. 25.  
Carth. 104.  
Skin. 274 pl. 2.  
Off. Ex. 82.  
1 Vent. 349.  
350. 2 Bl. Com.  
508.

x L. of Ni. Pr.  
48.

y L. of Ni. Pr.  
48. 12 Mod.  
471.

z L. of Ni. Pr.  
48. 91. C. B. R.  
441.

Yet on the general issue pleaded, he may give in evidence such payments, and they shall be deducted from the damages", or, if they amount to the full value, the plaintiff shall be nonsuited. But it may be doubted, whether in such action the defendant can give in evidence payment of debts to the value of such goods as are still in his custody or only of those which he has sold'. If the action be in trespass instead of trover, payment of debts to the value will go only in mitigation of damages", and the plaintiff will be entitled to a verdict.

The ground of the distinction seems to be that in trover, his possession is admitted to have been lawful, and the subsequent distribution negates the conversion; but in trespass, the unlawful taking is the subject matter of complaint, to which the distribution is not an answer.

Nor, in any case shall such payments be allowed to nonsuit the plaintiff, or to lessen the damages, if there be a failure of assets, and the lawful executor would by these means be divested of his right of referring one creditor to another of equal rank, or giving himself the same preference<sup>a</sup>.

<sup>a</sup> 2 Bl. Com.  
508. Off. Ex.  
182.

Nor shall an executor *de son tort*, derive any advantage from the wrongful character which he has assumed. He is not entitled to bring an action in right of the deceased<sup>b</sup>, nor is he empowered to retain in satisfaction of his own debt: for such a privilege would enable him to profit by his own tortious acts, and would tend to encourage a competition of creditors, who should first take possession of the testator's effects, without any legal authority<sup>c</sup>.

<sup>b</sup> 2 Bl. Com.  
507. Bro. Abr.  
tit. Admor. 8.  
11 Vin. Abr.  
222. 2 Anderf.  
39. pl. 25.

<sup>c</sup> 2 Bl. Com.  
511. 5. Co. 30.  
Moore 527.

There is, indeed, one exception to this rule; a party who, by stat. 43 Eliz. c. 8<sup>d</sup>, becomes an executor *de son tort*, in consequence of a gift to him of the intestate's effects by an administrator who has obtained the grant fraudulently, is by the express provision of that act allowed to retain. But in all other instances, an executor *de son tort* is excluded from this advantage. Nor shall he retain his own debt, even against a creditor of inferior degree<sup>e</sup>. Nor, after an action brought against him by a creditor, can he avail himself of a delivery over of the effects to the rightful administrator, though before the filing of the plea, nor of the assent of the administrator to his retainer of his debt.

<sup>d</sup> See Com Dig.  
Admor. C. 3.  
Off. Ex. 182.  
183. 2 H. Bl. 26.  
in not. & Vid.  
supr. 29.

<sup>e</sup> 3 Bac. Abr.  
25. 5 Co. 30.  
Cro. Eliz. 630.  
1 Roll. Abr.  
922.

Nor is the case varied, although in point of fact no administration were granted at the time of the commencement of such suit, and the defendant without delay relinquished the property to the grantee<sup>f</sup>.

<sup>f</sup> *Curtis v. Vernon*,  
3 Term. Rep.  
587. affirmed  
in Exch.  
Chamb. 2 H.  
Bl. 26.

If the executor *de son tort* deliver the effects to the administrator before such action brought, that is a sufficient defence, and he may give it in evidence on the plea of *plenè administravit*<sup>g</sup>.

<sup>g</sup> 1 Salk. 313.

The grant of administration to such executor shall legalise his previous acts<sup>h</sup>. Thus, where he takes possession of the testator's goods, and sells them, and afterwards is appointed administrator, such subsequent grant shall make the sale effectual<sup>i</sup>. So, if A. be ordered by B. to sell the effects of the intestate and B. afterwards take out administration; A. to an action brought against him by a creditor may plead *plenè administravit*, and shall be discharged on this evidence<sup>k</sup>. An administration, also, committed to an executor *de son tort*, and although committed to him *pendente lite*, shall warrant his retainer of his own debt, on the same principle of necessity, on which such right of executors is in general founded, namely, to avoid the inconvenience and absurdity of a party's instituting a suit against himself. So, where A., entitled to administration was opposed in the ecclesiastical court and, *pendente lite*, being sued as executor in the court of king's bench, pleaded a retainer for a debt due to himself, to which the plaintiff replied, that the defendant was executor *de son tort*: the defendant

<sup>h</sup> Com. Dig.  
Admor. C. 3.  
Moore 126.  
3 Term. Rep.  
590. 2 H. Bl. 25.

<sup>i</sup> Moore 126.

<sup>k</sup> Cro. Car. 38.

<sup>l</sup> 2 H. Bl. 25.  
argdo.  
Com. Dig.  
Admor. C. 3.  
2 Vent. 180.  
sty. 337.



defendant rejoined, that letters of administration had been granted to him *puis darrein continuance*; on demurrer, the plea was allowed, and judgment given for the defendant<sup>m</sup>. But if A. disposed of an intestate's goods to B. for the payment of the funeral, and afterwards take administration, it has been held, he shall not have an action of trover against B. for the goods<sup>n</sup>.

m 3 Bac. Abr. 26. in not.  
2 Stra. 1106.  
Andr. 328. S. C.  
3 Term Rep.  
588. S. G. cited  
L. of Nl. Pr.  
143, 144.  
n R. per two  
Just. Holt, C. J.  
confr. Salk.  
295. Skin. 274.  
Vid. Carth.  
104.

## C H A P. VII.

## OF DISTRIBUTION.

## S E C T. I.

*Of distribution under the statute—and herein of advancement.*

I AM now to discuss the power and duty of an administrator. His office, so far as it concerns the collecting of the effects, the making of an inventory, and the payment of debts, is altogether the same as that of an executor. But as there is no will to direct the subsequent disposition of the property, at this point they separate, and must pursue different courses.

a Supr. 54. et seq.

b 2 Bl. Com.  
515. 2 P. Wms.  
441. 1 Lev. 233.  
Cart. 125.

After the ordinary was divested of the power of administering an intestate's effects, and compelled, in the manner above mentioned<sup>a</sup>, to delegate such authority to the relations of the deceased, the spiritual court attempted to enforce a distribution, and took bonds of the administrator for that purpose; but such bonds were prohibited in the temporal courts, and declared to be void in point of law, on the ground, that, by the grant of administration, the ecclesiastical authority was executed, and ought to interpose no farther<sup>b</sup>. Thus the grantee was entitled

titled not only to administer, but also exclusively to enjoy the residue of the intestate's effects<sup>c</sup>. For the purpose therefore of aiding the imperfect jurisdiction of the ordinary, and of preventing any single hand from sweeping away the whole surplus<sup>d</sup>, the stat. 22 & 23 Car. 2. c. 10. commonly called the statute of distributions<sup>e</sup>, was enacted. That statute after empowering the ordinary on the granting of administration, to take a bond of the administrator, with two or more sureties conditioned, as I have already stated, further authorises him to proceed, and call such administrator to account touching the goods of the estate; and, on hearing, and on due consideration thereof, to make equal, and just distribution of what remains clear after all debts, funeral, and just expences of every sort first allowed, and deducted, among the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the deceased, in equal degree, or legally representing their stocks, *pro suo cuique jure*, according to the laws in such cases, and the rules, and limitation thereafter set down; and the same distributions to decree and settle, and to compel such administrator to observe and pay the same by the due course of the ecclesiastical laws. The statute then proceeds to prescribe the distribution of such surplusage in manner following; that is to say, one third part thereof to the wife of the intestate, and all the residue by equal portions among his children, and such persons as legally represent such children, in case any of them be then dead, other than such child or children not being heir at law, as shall have

<sup>c</sup> 2 P. Wms. 448.

<sup>d</sup> 1 P. Wms. 594. Raym. 496. 4 Burn. Eccl. L. 342. 343.

<sup>e</sup> Made perpetual by 1 Jac. 2. c. 17. f. 5. Vid. 1 Lord Raym. 574.

have any estate by the settlement of the intestate, or shall be advanced by him in his life-time by portion equal to the share, which shall by such distribution be allotted to the other children to whom such distribution is to be made; and in case any child, other than the heir at law, who shall have any estate by settlement from the intestate, or shall be advanced by him in his life-time by portion, not equal to the share which will be due to the other children by the distribution, then so much of the surplusage shall be distributed to such child as shall have any land by settlement from the intestate, or was advanced in the life-time of the intestate, as shall make the estate of all the children to be equal as near as can be estimated; but the heir at law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of such land.

It then directs, that in case there be no children, nor any legal representative of them, one moiety of the estate shall be allotted to the wife of the intestate, and the residue of the same shall be distributed equally among every of his next of kindred who are in equal degree, and those who legally represent them.

It also provides, that no representations shall be admitted among collaterals after brothers', and sisters' children: And in case there be no wife, then that



that all the estate shall be distributed equally among the children; and, in case there be no child, then among the next of kindred to the intestate in equal degree, and their legal representatives as aforesaid, and in no other manner.

And it farther directs, for the benefit of creditors, that no such distribution of the goods of an intestate shall be made, till after the expiration of one year from his death; and that every one to whom any distribution and share shall be allotted, shall give bond with sufficient sureties, in the spiritual court, that if any debt truly owing by the intestate, shall be afterwards sued for and recovered, or otherwise duly made to appear, that then, and in every such case, he shall refund, and pay back to the administrator, his rateable part of that debt, and of the costs of suit, and charges of the administrator by reason of such debt, out of the part and share so allotted to him, thereby to enable the administrator to pay and satisfy the debt so discovered after the distribution made.

The statute also contains a proviso, that in all cases where the ordinary hath used heretofore to grant administration *cum testamento annexo*, he shall continue so to do; and the will of the deceased in such testament expressed, shall be performed, and observed in such manner as before the passing of the act.

It

It also expressly excepts, and reserves the customs of the city of London, of the province of York, and of other places having peculiar customs of distributing an intestate's effects,

Vide *supr.* 58.

Doubts having arisen, whether the husband's right to administration to his wife was not superseded by force of this statute, and whether he was not thereby bound to distribute her personal estate among her next of kin; by the stat. 29 *Car.* 2. c. 3. s. 25. it is provided, that the above act shall not extend to estates of feme covert, who die intestate, but that the husband may demand, and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as before.

On the construction of the statute of distributions, a variety of points have been resolved,

After the allotment of one-third to the widow, the statute, as we have seen, directs a distribution of the residue by equal portions among the intestate's children, and such persons as legally represent such children, in case any of them be dead, that is their lineal descendants to the remotest degree.

To attain a clearer apprehension of the subject, three sorts of cases may be supposed; First, where none of the intestate's children are dead. Secondly, where the intestate's children are all dead, all of them having left children. Thirdly, where some of the intestate's children are living, and some dead,

dead, and such, as are dead, have each of them  
left children.

On the first hypothesis, that is to say, where  
none of the intestate's children are dead; it is suf-  
ficiently obvious, that after the wife has had her  
third allotted to her, the remaining two thirds shall,  
pursuant to the statute, be equally divided among  
all the children of the intestate, as in this case  
they all claim in their own right. A brother, or  
sister of the half blood, shall be equally entitled to  
share with one of the whole blood, inasmuch as  
they are both equally near of kin to the intestate.  
Nor shall their being posthumous in either case  
make any difference<sup>1</sup>. If the intestate leave only  
one child, such case is not to be considered as omit-  
ted by the statute; therefore, in case he also leave  
a wife, she shall have only a third part, and the  
other two thirds shall go to such child<sup>2</sup>. So, where  
there is only one to claim under the statute, and  
therefore, literally and strictly speaking, there can  
be no distribution, yet such individual shall be en-  
titled to the property<sup>3</sup>.

- <sup>1</sup> 3 Bac. Abr.  
74. 1 Med 309.  
<sup>2</sup> Mod. 204.  
<sup>3</sup> Jones 93.  
<sup>4</sup> Vent. 316.  
<sup>5</sup> Lev. 173.  
Show. Parl.  
Ca. 108.  
<sup>6</sup> Vern. 437.  
<sup>7</sup> Vern. 124.  
Carth 51.  
<sup>8</sup> Burnet v.  
Man, 1 Vef.  
156. 4 Burn  
Eccl. L. 344.  
<sup>9</sup> Freem. 130.  
<sup>10</sup> P. Wms. 446.  
<sup>11</sup> 3 Bac. Abr.  
75. Carth. 52.  
Skin. 212. pl. 5.  
119. pl. 3.  
<sup>12</sup> 4 Burn. Eccl.  
L. 343.  
<sup>13</sup> P. Wms. 49.  
note (D).

In regard to the second supposition, if A. have  
three children, B. C. and D., and they shall die, B.  
leaving, for instance, two children, C. three, and  
D. four, and A. afterwards die intestate; in that  
case all his grand-children shall have an equal  
share; for as his children are all dead, their chil-  
dren shall take as next of kin. Such also would  
be the case with respect to the great-grandchildren  
of

2 3 Bac. Abr.  
75. 1 Eq. Ca.  
Abr. 249. pl. 7.  
Prec. Chan. 54.  
1 P. Wms. 595.  
3 P. Wms. 50.  
2 Vef. 213.  
1 Atk. 454.  
Eunb. 159.  
2 Bl. Com. 517.

1 1 Bl. Com.  
218. 517.

1 1 Bl. Com.  
217.

2 3 Bac. Abr.  
75. 1 Eq. Ca.  
Abr. 249.  
Prec. Chan. 54.  
2 Bl. Com. 517.

of the intestate, if both his children, and grand children had all died before him<sup>k</sup>.

In all the above instances, the parties are said to take *per capita*, or, in other words, equal share in their own right<sup>l</sup>.

Thirdly, in the event of some of the intestate children being living, and some dead, and such are dead, having each left children; the grand children take *per stirpes*, that is to say, not in their own right, but by representation<sup>m</sup>. Thus, for example, if A. have three sons, B. C. and D, and B. die, leaving four children, and C. die, leaving two: on A.'s dying intestate, one third shall be allotted to D., one third to B.'s four children, and the remaining third to C.'s two children; for the grand children are entitled as representing the respective parents<sup>n</sup>.

After directing the residue to be divided among the children, or their representatives, as above stated, the statute provides, that no child of the intestate, except his heir at law, on whom he settled in his life-time any estate in lands, or pecuniary portion equal to the distributive shares of the other children, shall participate with them of the surplus; but if the estate, so given him by way of advancement, be not equivalent to their share, then that such part of the surplus as will make so, shall be allotted to him.



The statute does not divest the child of any property which has been thus given to him, however unequal it may have been, or how much soever it may exceed the residue: he may, if he pleases, keep it all: if he be not contented, but would have more, then he must bring what he has before received, as the law expresses it, into hotch pot, that is, into the general mass of the property to be divided,

This is the clear intention of the act, grounded on that principle of equality, to which a court of equity is ever inclined.

2 P. Wms.  
443, 449.  
4 Burn. Eccl.  
L. 344.  
2 Bl. Com.  
190, 517.

Therefore, before a younger child has any claim to a share of the distribution, he must first bring his advancement into hotchpot.

What shall constitute such advancement, is now to be discussed.

If a father purchase for the son an advowson, or any other ecclesiastical benefice, or, if he buy him any office, civil, or military, these are held to be such advancements, either partial, or complete, according to the comparative value of the estate to be distributed. And although the office be only

3 P. Wms.  
317. not (O).  
Sed. Vid.  
Swinb. p. 3.  
f. 18.

will, as a gentleman pensioner's place, or a commission in the army, it is regarded in the same light.

3 P. Wms.  
317. not (O).

A provision

A provision made for a child, by a settlement either voluntary, or for a good consideration, at that of marriage, is an advancement *pro tanto*.

r 2 P. Wms.

440, 444.

2 Vern. 638.

611 Vin. Abr.

291. 2 P. Wms.

441.

23 P. Wms. 441.

21 P. Wms.

440, 445.

2 P. Wms.

442. Swinh.

P. 3. f. 4.

2 P. Wms.

442.

2 P. Wms.

445.

2 P. Wms.

442, 446, 449.

Nor does the statute extend only to land itself when settled on a younger child by the father, but also to a charge on the land, created by him for the benefit of such child, therefore, if a father settle rent out of his lands on a younger child, this also is such an advancement as is intended by the statute. Nor is it necessary that the provision should take place in the father's life-time. If, by deed he settle an annuity, to commence after his death on such child, it is of the same description. So a reversion settled on a child, as it is capable of being valued, is of the same nature. A portion secured to a child, although *in futuro*, is also an advancement. And were it only contingent, when the contingency has happened, it shall be thus considered.

A portion for a daughter to be raised out of lands, on her attaining the age of eighteen, or the day of her marriage, was accordingly held to be an advancement to her when she married, although she were under that age, and unmarried, at the time of the intestate's death.

2 P. Wms.

435.

b Per Sir Jos.

Jekyll, M. R.

arguendo 2 P.

Wms. 442.

A portion, also, while contingent, is capable of a valuation, and may, it seems, be brought in as a hotchpot; or the court may order that, in case

the contingency should happen, the portion shall be so distributed as to make the rest of the children equal with the child on whom it was settled<sup>b</sup>, but the contingency must be so limited as necessarily to arise within a reasonable time, as in the above case, where the portion was secured for the daughter, on her attaining the age of eighteen, or her marriage<sup>c</sup>. A child advanced in part shall bring in his advancement only among the other children; for no benefit shall accrue from it to the widow<sup>d</sup>. If a child, who has received any advancement from his father, shall die in his father's lifetime, leaving children, such children shall not be admitted to their father's distributive share, unless they bring in his advancement, since, as his representatives, they can have no better claim, than he would have had if living<sup>e</sup>.

<sup>b</sup> Per Lord Raymond, C. J. *arguenda*.  
<sup>a</sup> P. Wms. 446.

<sup>c</sup> & P. Wms. 440, 445, 449.

<sup>d</sup> 3 Bac. Abr. 77. Prec. Chan. 182, 184.

<sup>e</sup> & P. Wms. 560.

By this statute, although the heir at law shall abate in respect of the land, which came to him by descent, or otherwise, from the intestate; yet, if he hath had an advancement from his father in his life-time, out of the personal estate, he shall abate for it in the same manner as the other children<sup>f</sup>. And, were it merely the use of furniture for his life, it shall be regarded as an advancement *pro tanto*<sup>g</sup>. So, where A. on his marriage, was ennobled in case of a second marriage, to pay his eldest son, by his first wife, five hundred pounds; she died, leaving a son, and other children, and A. after a second marriage, died intestate; it was decreed, that his heir should bring in the

<sup>f</sup> Com. Dig. Admon. H. 4 Burn Eccl. L. 344. Fitzg. 285.

<sup>g</sup> Com. Dig. Admon. H. Fitzg. 285.



the money, although he were in the nature of  
 h 2 Vern 638. purchaser, under a marriage settlement<sup>n</sup>.

Co-heiresses shall also, it seems, bring in for  
 advancement, not being land, as they may be  
 respectively received from their father, before they  
 shall be entitled to their distributive shares, agree-  
 ably to the principle of the act, and to the object  
 of a just and impartial father to promote an equality  
 among his children<sup>1</sup>.

1 4 Burn. Eccl.  
 L. 344 2 P.  
 Wms. 440, 443.

Such is the nature of the advancement which  
 will exclude a child from any part of the residue.  
 Many benefits, however, may be conferred upon  
 him by his father, which have been held not to  
 of this description.

Small, inconsiderable sums of money given  
 a child, by the father, or mere trivial presents  
 may make to the child, as of a gold watch,  
 wedding clothes shall not be deemed an advance-  
 ment<sup>k</sup>, nor shall money expended by the father  
 for his maintenance, nor given to bind him  
 apprentice, nor laid out in his education at school  
 at the university, or on his travels<sup>l</sup>. Nor shall  
 what a child receives out of the mother's estate,  
 so regarded<sup>m</sup>. Nor shall a provision, which a  
 father may make for his child by will, (for a case  
 may occur, where a testator may die intestate  
 as to part of his personal estate,) be considered  
 that light. Nor land given by the father's will  
 to a younger child<sup>n</sup>.

1 3 P. Wms.  
 317. not. (n).  
 1 Ves. 16.  
 Ambl. 189.  
 3 Atk. 528.  
 1 3 Bac. Abr. 76.  
 Swinb. p. 3.  
 f. 18.  
 2 P. Wms. 449.  
 m 2 P. Wms.  
 336.

n 2 P. Wms.  
 440, 446.



Such a provision as shall be construed an advancement, must result from a complete act of the intestate in his life-time<sup>a</sup>, by which he divested himself of all property in the subject, though as we have just seen<sup>b</sup> it may not take effect in possession till after his death. Still less shall property given or bequeathed to the child by any other person be so denominated<sup>c</sup>, and least of all shall a fortune of his own acquisition<sup>d</sup>.

<sup>a</sup> 2 P. Wms. 440.

<sup>b</sup> Vid. *supra*. 298.

<sup>c</sup> 3 Bac. Abr. 76. Swinb. p. 3. l. 18.

<sup>d</sup> Swinb. p. 3. l. 18.

In respect to borough English lands, which descend to the youngest son, it has been held that we should allow for them, on the ground, that the statute intended merely to provide for the heir of the family, that is, the heir by the common law, and not one who is heir only by custom in some particular places<sup>e</sup>. But that decision has been over-ruled, and it is now settled, that such youngest son shall have an equal share of the distribution with the other children without regard to this species of estate: for although the exception in the statute extends only to the eldest son, yet no law exists to oblige the heir in borough English to bring in his lands. The statute contains no such requisition. It speaks merely of such estate as a child hath by settlement, or by advancement of the intestate in his life-time<sup>f</sup>.

<sup>e</sup> Per Sir Jos. Jekyll, M. R. Stra. 935.

<sup>f</sup> Per Lord Talbot, C. C. Temp. Talb. 276. 4 Burn. Ecl. L. 345.

Thus must the surplus be distributed in case the intestate has left a wife and children, or representatives of children.

The

The statute then provides, that if there be no children, or legal representatives of them, in existence, a moiety shall go to the widow, and another moiety to the next of kindred, in equal degree and their representatives; but no representation among collaterals shall be admitted farther than brothers and sisters children. If there be no widow, the whole shall go to the children. If there be neither widow nor children, then the whole shall be distributed among the next of kin, in equal degree, and their representatives, as above mentioned.

The next of kin referred to by the statute are to be traced by the same rules of consanguinity as those who are entitled to letters of administration. Those rules have been already discussed.

2 Bl. Com.  
515. 2 Vef. 274.  
r Vid. *supr.* 60.

The mother, therefore, as well as the father succeeded to all the personal effects of the children who died intestate, without wife or issue, in exclusion of the other sons and daughters, the brothers and sisters of the deceased; and such is the law still with respect to the father; but by the stat. 1 Jac. 2. c. 17. s. 7. if, after the death of the father, and in the life-time of the mother, any of the children die intestate, without wife or children, every brother and sister, and their representatives, shall have an equal share with her. The principle of which provision is this, that otherwise the mother might marry, and transfer all to another husband.

2 Bl. Com.  
515, 516.  
Ambl. 192.

1 Salk 251.  
pl. 2. 1 P.  
Wms. 48, 49.  
Lord Raym.  
684. Com.  
Rep. 96. pl. 95.

On this last mentioned statute it has been held, that if A. die intestate, and without issue, leaving a wife, and several brothers and sisters, and his mother living, the mother shall have no more than an equal share of a moiety of the estate with the brothers and sisters. And, although there should be no brother, or sister, yet if there be children of a deceased brother or sister, they shall partake with their grandmother to the same extent as their parent would have been entitled to.

h 2 P. Wms.  
344. 1 Stra.  
710. Gibb.  
Rep 189.  
1 Atk. 455.

To return now to the statute of distributions. That clause of it, which expresses that there shall be no representations among collaterals beyond brothers and sisters children, must be construed to mean brothers and sisters of the intestate, and not as admitting representation, when the distribution happens to fall among brothers and sisters, who are remotely related to the intestate; for the intestate is the subject of the act; it is his estate, his wife, his children; and for the same reason, his brothers' and sisters' children, for he is equally relative to all. Therefore it has been held, that if the brother of an intestate hath a grandchild, and a sister has a son or daughter, the grandchild shall not have distribution with the son or daughter of the sister. So, it has been decreed, that if an intestate leave an uncle, and a deceased brother's son, the latter shall have no distributive share.

2 Raym. 496.  
2 Show. 286.  
2 Vern. 168.  
1 Salk. 250.  
Ld Raym. 571.  
Com Rep. 87.  
pl. 56. 1 P.  
Wms 25, 595.  
1 Salk. 250.  
1 Ld. Raym.  
571.

2 1 P. Wms.  
593.

The words of the statute must be taken together.

The expression *pro suo cuique jure*, will let in any advantage

advantage of equality or preference, which a person was entitled to by our law before the statute. Therefore, a grandfather, although he be in an equal degree of consanguinity with the brother of the deceased, shall have no share with him in the distribution; for by the common law, there was but one degree between brother and brother, and it would be unnatural to carry the personal estate up to the grandfather, who must be presumed to have been long provided for, and to be going out of life.

2 Ambl. 191.  
Vid. *supr.* 63.

So, a grandfather shall exclude an uncle; and independently of the provisions of the statute, by the common law the former was entitled to a preference, as being of the right line, whereas the latter is only of the collateral line; in other words, the grandfather is the root of the kindred, and the uncle is only a branch.

h 1 Salk. 38.  
251. Id. Raym.  
684, Com. Rep.  
2d Edit. 96,  
108, 109.  
12 Mod. 613.  
2 Ves. 215.  
1 P. Wms. 41.

The law, of course, is the same in respect to grandmothers, and aunts.

2 Com. Dig.  
Admon. H.  
1 Salk. 38, 251.

Where the next of kin are a grandfather by the father's side, and a grandmother by the mother's side, they shall take in equal moities, as being in equal degree: for in respect of such claims, as hath formerly been observed, dignity of blood makes no difference.

1 Salk. 64.

1 P. Wms. 53.

Uncles and nephews, aunts and nieces, are in equal degree. And where the intestate left



ants, and a nephew, and a niece, children of a deceased brother, Lord Hardwicke C. ordered the surplus to be divided into four parts equally among them, holding that as they were all in equal degree, the children were to take in their own right, and not by representation, but that if their father had been living, he would have been entitled to the whole.

d 1 Ark. 454.

The grand daughter of a sister, and the daughter of an aunt of the intestate, are also in equal degree, and entitled to equal distribution.

c Com. Dig.  
Admon. (H.)  
1 Ves. 333.

Although the statute direct that no distribution shall be made till a year has elapsed from the death of the intestate, yet, if a person entitled to a distributive share shall die with the year, such interest shall be considered as vested in him, and shall go to his personal representative; for this proviso makes no suspension or condition precedent to the interest of the parties, but was inserted merely with a view to creditors.

The statute, also, is in the nature of a will, made by the legislature for all such persons as die without having made one for themselves; and in consequence the parties entitled in distribution resemble a residuary legatee; and it has been always held, that if such legatee die before the amount of the surplus is ascertained, still his representative shall

f 3 Bac. Abr.  
75. Carth. 51.  
52. Comb. 14.  
112. 2 Show.  
285. Skin. 212.  
218. 3 Mod. 58.  
11 Vin. Abr. 92.  
Vid. *supr.* 268.

shall have the whole residue, and not the representative of the first testator<sup>f</sup>.

Affinity, or relationship by marriage, except in the instance of the wife of the intestate, gives no title to a share of his property: as, if A. have a son and daughter, B. and C., and they both die, the former leaving a wife, and the latter a husband; on A.'s dying afterwards intestate, such husband and wife have neither of them any claim on his estate.

g Vid. *supr.* 78.

If a bastard, or any other person having no kindred, die intestate, without wife or child, his effects, as we have seen<sup>g</sup>, belong to the king, who with the exception of a small part, usually grants them by letters patent, or otherwise; and the such grantee seems of course entitled to the administration, and, consequently, to the sole enjoyment of the property<sup>h</sup>.

h 2 Bl. Com.  
505. Doug.  
542.

The personal property of an intestate wherever situated, must be distributed according to the law of the country where his domicil was, and such *prima facie* the place of his residence, but that may

i 2 Ves. jun. 198.  
See also Sir  
Chas. Douglas's case there cited.

be rebutted or supported by circumstances<sup>i</sup>; for although the locality of the party's abode at the time of his death determine the rule of distribution, yet it must be a stationary, not an occasional residence, in order that the municipal institution may attach on the property<sup>k</sup>. If, therefore,

k 1 Wooddes.  
385. Amb. 25,  
415, 416.

Englishman

Englishman be settled and die in this country, and administration be taken out to him here, debts due to him, or other of his personal effects in Scotland, or abroad, shall be distributed according to the law of England<sup>1</sup>; But, if an alien, resident abroad, die intestate, his whole property here is distributable according to the laws of the country where he so resides, otherwise no foreigner could deal in our funds but at the peril of his effects going according to our laws, and not to those of his own country<sup>m</sup>.

m 1 Wooddes.  
385. Ambl. 27.

## S E C T. II.

### *Of distribution by the custom of London.*

I PROCEED in the last place to consider the customs of the city of London, on this subject, and also of the province of York, and the principality of Wales; which having peculiar customs distributing intestate's effects, are expressly excepted from the operation of the statute.

Although the restraints in regard to the power making wills, which subsisted in those respective districts, are now removed by different statutes; namely, the 4 & 5 W. & M. c. 2. explained by the 3 Ann. c. 5. for the province of York; the 8 W. 3. c. 38. for Wales; and the 11 G. 1.

4. 18. for London; by which persons residing in those several places, and liable to those customs are empowered to dispose of all their personal estates by will, and the claims of the widow, children, and other relations to the contrary, are totally barred; yet those customs remain in force with respect to such property of an intestate. Their nature and incidents, therefore, now demand our attention.

a 2 Bl. Com.  
493, 517, 518.  
L. of Test. 194.

b Ld. Raym.  
1329 4 Burn  
Eccl. L. 387.  
c 4 Burn Eccl.  
L. 398.  
d 4 Burn Eccl.  
L. 421.  
e 4 Burn Eccl.  
L. 423, 424.

f 2 Bl. Com.  
518. Off. Ex 97.

g Supr. 55.

In the city of London<sup>b</sup>, and the province of York<sup>c</sup>, as well as in the kingdom of Scotland and therefore, probably also in Wales<sup>e</sup>; (respecting the latter of which, little information is to be collected, except from the statute of W. 3.) the effects of the intestate, after payment of his debts are in general divided according to the ancient doctrine of the *pars rationabilis*<sup>f</sup>, to which I have before alluded<sup>g</sup>.

And, first, as to the custom of London, if a freeman of the city die, leaving a widow and children, his personal property, after deducting her apparel, and the furniture of her bed-chamber, is divided into three equal parts, one of which belongs to the widow, another to the children, and the third to the administrator in that character. If only a widow, or only children, they shall respectively, in either case, take a moiety, and the administrator the other<sup>i</sup>. If neither widow nor child, the administrator shall have the whole<sup>k</sup>.

i 1 P. Wms.  
341. 2 Salk.  
416. 1 Vern.  
132. 4 Vern.  
612. L. of Test.  
210, 211.  
3 Atk. 527.

k 2 Show. 175.



The portion of the administrator is styled in law the dead man's part. It is so called, because formerly, as we have seen<sup>1</sup>, the ordinary or his grantee was to dispose of it in masses for the deceased's soul. But, after the disuse of this superstitious practice, the administrator was wont to apply it to a better purpose, that is to say, for his own benefit<sup>m 2 Freem. 85. 1 Vern. 133.</sup>, till the legislature thought it was capable of an application still better; and accordingly, by the stat. 1 Jac. 2. c. 17. declared, that it should be subject to the law of distributions.

Hence, if a freeman die worth eighteen hundred pounds personal estate, leaving a widow and two children, this estate shall be divided into eighteen parts, of which the widow shall have eight, six by the custom, and two by the statute; and each of the children five, three by the custom, and two by the statute; if he leave a widow and one child only, she shall still have eight parts as before; and the child shall have ten, six by the custom, and four by the statute; if he leave a widow, and no child, the widow shall have three fourths of the whole, two by the custom, and one by the statute; and the remaining fourth shall go by the statute to the next of kin<sup>2</sup>.

A posthumous child shall come in for his customary share with the other children<sup>3</sup>. But the custom extends merely to the wife and children of the freeman, and not to his grand-children<sup>4</sup>.

<sup>2</sup> 1 Bl. Com. 518. L. of Test. 309.

<sup>3</sup> Prec. Chan. 499. L. of Test. 303. 11 Vin. Abr. 308. Gilb. Eq. Rep. 155.

<sup>4</sup> 1 P. Wms. 341. 1 Vern. 397. 2 Salk. 426. L. of Test. 310.

Hence,

Hence, if a freeman die intestate, leaving a wife but no child, yet, if there hath been a child, and there be any legal representatives, that is, lineal descendants of such child, they are admitted to his distributive share of the dead man's part under the statute, though they are entitled to no part of his share by the custom. In that case, therefore, of the dead man's part by the statute, the wife shall have one third, and the representatives shall have the other two thirds; so, that dividing the whole personal estate into six parts, she shall have four, and the representatives two.

If there be neither wife nor child, nor such representative of a child, the whole shall be subject to the statute of distributions<sup>o</sup>.

<sup>o</sup> L. of Test.  
192, 221, 222.  
1 Vern. 200.

<sup>p</sup> L. of Test.  
202, 1 Vent.  
180. 1 Mod. 80.

<sup>q</sup> L. of Test.  
202, 200.  
1 Roll. Rep.  
316. 1 Sid. 250.  
1 Vent. 180.  
1 Mod. 80.  
2 Vern. 48, 82.  
110.

<sup>r</sup> 2 Bl. Com.  
518.

<sup>s</sup> 7 Vin. Abr.  
200. tit. Customs, (B. 2.)  
Bridle  
v. Bridle.  
4 Burn Eccl.  
L. 388.  
t Swinh. p. 6.  
f. 13.

The children of a freeman are entitled to the benefit of the custom, although they were born out of the city<sup>p</sup>, and their father neither resided nor died within it<sup>q</sup>.

In respect to the widow, I have already mentioned, that she is entitled to her apparel and the furniture of her chamber, which is called the widow's chamber<sup>r</sup>; or in lieu of it, in case the estate shall exceed two thousand pounds, it has been said, that she is entitled to fifty pounds<sup>s</sup>. The privilege of the widow's chamber is analogous to her right to paraphernalia in general cases, and, like that, shall in no case be exercised to the prejudice of creditors<sup>t</sup>.

If she be provided for by a jointure before marriage in bar of her customary part, she is put in a state of non-entity with regard to the custom only; but she shall still be entitled to her share of the dead man's part, under the statute of distributions. But, if the jointure is expressed to be in bar of her dower without saying more, this shall not bar her of her customary share of the personal estate, for and is wholly out of the custom. Such also is the case, in the intestate covenant to lay out money in a purchase of land, by way of jointure, for the money has in equity all the qualities of land.

2 Ventr. 665.  
1 P. Wms. 644.  
3 P. Wms. 16.  
315. 1 Atk. 64.  
403.  
w 1 Vern. 15.  
2 Chan. Rep. 252.  
x 1 Eq. Ca. Abr. 158, 159.  
1 P. Wms. 531. 647.  
Prec Chan. 505. L. of Test. 214.  
y 1 P. Wms. 532.

And *à fortiori* she shall not be excluded from her customary share, if the settlement be so expressed; as if it contain a proviso, that she shall not be barred or deprived of her right to dower, or of taking any other gift, provision, or bequest, her husband shall think fit to give or leave her by deed or will, or any other means whatsoever. On the other hand, the settlement may be expressly in bar as well of her share of the dead man's part, as of her share by the custom, and then she shall be excluded from both. Or if it be made in satisfaction of all her demands out of his personal estate, by the custom or otherwise, she shall be barred also of her share under the statute.

2 Bro. Ch. Rep. 95.  
2 1 Eq. Ca. Abr. 153. Gilb. Eq. Rep. 95. 8 C. L. of Test. 214.  
b 7 Vin. Abr. 211. 1 Vern. 15.  
4 Burn Eccl. L. 404. Vid L. of Test. 212, 213.  
c Bunb. 16.

If the wife be divorced for adultery, *à mensâ et thro*, she forfeits her customary share.

If

87 H. Com.  
519. 2 Vern.  
558

8 Vid. *supr.* 5.

h 3 P. Wms.  
528. not (Q)  
Vid. also *Proc.*  
Chan. 207.

i 2 P. Wms.  
527.

k L. of Test.  
206, 223.  
2 P. Wms 527.  
1 Vern. 200.  
5 Ark. 64.

l L. of Test.  
204. 1 Vern.  
345. 1 Vern.  
781 2 Bl. Com.  
519. 2 Freem.  
579. 1 P. C.  
Abr. 155.  
2 P. Wms 526.  
Ambl. 189.

If a freeman leave several children, the share or the orphanage part of any one of them, is not vested in him by the custom till the age of twenty-one, before which period he cannot dispose of it by will, and if he die under that age, whether sole or married, his share shall survive to the others<sup>g</sup>; whereas the share by the statute is vested, and, therefore, such child may devise it at the age of fourteen if a son, and at twelve if a daughter<sup>h</sup>. But in case there be only one child, his orphanage part is vested in him, in the same manner as his share by the statute, and is devisable by him at the same age<sup>i</sup>.

If any of the children are advanced to the full extent of the custom by the father in his life-time they shall be entitled, by the custom, to no farther dividend<sup>j</sup>. If a freeman have several children, and fully advance them all, the custom, in regard to them, is satisfied, and his personal estate, independent of the widow's customary share, shall be distributed according to the statute. If he has only one child, and fully advances him, the consequence is the same<sup>k</sup>. If the children are advanced only partially, they must bring their portion into hotchpot before they can derive any advantage from the custom; and, in that case, their portion must be brought in with the other brothers and sisters, but not with their mother, for the principle here also is to make an equality among the children, and not to benefit the widow<sup>l</sup>. Nor, where a freeman has in part advanced his only child, shall suc-

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child bring in his advancement, for there is none to claim with him of equal degree<sup>m</sup>. And where one of several such children is advanced, his advancement shall be in satisfaction merely of his orphanage share, but not of his share of the dead man's part, to the whole of which he shall be entitled, without regard to what he shall have received from his father<sup>n</sup>.

<sup>m</sup> 3 Salk. 226.  
<sup>n</sup> Vern. 234.  
628. 754.

<sup>n</sup> 3 Atk. 272.  
2 Atk. 523.

In case such advancement be brought into hotchpot, it must be brought into the orphanage part only<sup>o</sup>.

<sup>o</sup> Vern. 345.

If the advancement shall have exceeded the child's share by the custom, whether he must bring in such excess before he is entitled to his share of the part distributable by the statute, is a point on which there are opposite opinions. By some writers it has been held, that he has a claim to his full share by the statute, without any retrospect to his advancement, whatever might have been its amount. By others it has been maintained, that he has no right to such distributive share, unless he bring into the same so much of his advancement as exceeded his proportion of his customary part<sup>p</sup>. To reconcile this variance, a distinction has been suggested between an advancement given and accepted expressly in satisfaction of the customary share, and an advancement given generally, without any such agreement or stipulation: That, in the former case, in the distribution of the dead man's part, no respect shall be had to the advancement,

<sup>p</sup> Vid. 4 Burn.  
Eccl. L. 406.  
<sup>q</sup> Vern. 274.

q 4 Burn Eccl.  
L. 207.

ment, as it is considered in the light of a purchase by the child, and might have happened to be less, as well as greater, in point of value, than the customary part. But, where there is no such special contract or agreement, and the advancement is general, it shall be applied either to the customary share only, or both to the customary and distributive share, according to the amount of the advancement<sup>q</sup>.

r 1 Eq Ca. Abr.  
150. 2 Vcl. 593.

a Ch. Ca. 160.  
235. L. of  
Test 194.  
1 Vern. 2.

t 2 Ch. Ca. 160.

u 1 Vern. 345.

w Vid. *supr.*  
300.

x Sed vid.  
1 Atk 403.

y Vid. 2 Atk.  
277.

As to the nature of the advancement, whether complete or partial, it must arise exclusively from the personal estate. In the establishment of the custom the citizens of London had no regard to real property, on supposition, that a freeman would not purchase land, but would employ his whole fortune in commerce<sup>r</sup>. If, therefore, a citizen settle a real estate on a child, it shall be no advancement<sup>a</sup>; nor, although it be expressly for that purpose, shall it bar him of his orphanage part<sup>t</sup>. Nor, if money be given by the father to be laid out in land, to be settled on the son on his marriage, shall it be deemed personal estate, nor any exclusion<sup>u</sup>.

What has been already stated in general cases<sup>w</sup> respecting small presents made to the child by the father, his disbursements for the child's maintenance and education, or placing him out apprentice<sup>x</sup>, a legacy left him by the father dying partially intestate<sup>y</sup>, property given him by any other than his father, as well as a fortune of the child's

own raising, is here equally applicable. He is not by any of these means advnced. For that purpose it must be a provision made for him by the father while living, out of his personal property<sup>7</sup>. In short, there must, in all instances of this nature, be a valuable consideration moving from the father, and an actual benefit accruing to the child<sup>2</sup>. Indeed, it has been made a question, whether such provision as shall amount to an advancement, should not be made on marriage, or in pursuance of a marriage agreement<sup>4</sup>. But, it seems, the custom on this head is not so restricted, but extends to any other establishment of the child in life<sup>b</sup>.

x Laws of Lond 82.  
 2 Vern 61.  
 4 Burn Eccl. L. 412. 415.  
 Vid. 1 Vef. 17.  
 3 Atk. 213. 452.  
 3 P. Wms. 317.  
 not (o).  
 1 Will. 168.  
 y L. of Test. 204. 1 Vern 61. 89. 216.  
 3 Atk. 528.  
 z 1 Atk. 303.  
 a 1 Vern. 61. 89. Vid. also 3 Atk. 213.  
 b L. of Test. 204. 1 Atk. 403.

If the child, whether the only one or not, be married in the life-time of the father, with his consent, although such child were not fully advanced, yet, to entitle himself to a further portion, he must produce a writing under his father's hand, expressing the value of the advancement, in order that it may be ascertained what proportion it bore to his share by the custom<sup>c</sup>. If no such writing be produced, or if, on the production of such writing, the specific amount does not appear on the face of it; such advancement shall be presumed to have been complete till the contrary be shown<sup>d</sup>. But mere parol declarations of the father, that he had fully advanced the child, whether with or without a specification of the value, shall be of no avail<sup>e</sup>.

c I.d. Raym. 484. 1 Eq. Ca. Abr 154.  
 4 Burn Eccl. L. 393. L. of Test 203.  
 3 Atk. 451, 452.  
 527. 1 Atk. 406.  
 d 2 P. Wms. 527. 4 Burn Eccl. L. 408.  
 in not 3 Atk. 527.  
 e id. 1 P. Wms 634.  
 2 P Wms. 5:7.  
 1 Atk. 407.

Thus

*In Wid. & Burr's  
Hench. L. 417.*

*In Wid. & Burr's  
Hench. L. 417.*

Thus, from what has been stated, it appears, that if a freeman die intestate, leaving no wife, and an only child, whether the child be fully advanced, or partially advanced, or not advanced; in either of these cases, the child is entitled to the whole personal estate<sup>a</sup>. If he be fully advanced, he shall have nothing by the custom, but shall have all as next of kin. If he be partially advanced, since he has no brother or sister, with whom to bring his partial advancement into hotchpot, he shall have one half by the custom, and the other half by the statute: if he be not advanced, he shall have one half by the custom, and the other half by the statute<sup>b</sup>.

If the freeman leave no wife, but several children, as for instance, three, one of whom is advanced, another partly advanced, and the third not advanced; in this case the child partly advanced, and the child not advanced, after the former has brought in his partial advancement, shall share one half equally between them by the custom; and the other half, namely the dead man's part, although the first child have been fully advanced, shall without his bringing his advancement into hotchpot, be distributed by the statute equally among them all.

If such advancement exceeded his orphanage part, then, whether the excess shall go in satisfaction of his distributive share by the statute, or not, seems to depend on the provision's being expressly



precisely in satisfaction of the orphanage part, or whether it be general and without any stipulation<sup>1</sup>. Vid. sup. 313. 314.

The interest, which a child has in such orphanage part, is a mere contingency and no present right, and therefore a release of it is not valid in point of law; but, if founded on a valuable consideration, shall operate as an agreement, and be binding in equity<sup>1</sup>. Therefore, a freeman's child, if of age, may, in consideration of a present fortune, waive all claim to the orphanage part: as where the father, on the marriage of his daughter, who had attained twenty-one years, agreed to give her three thousand pounds, and she covenanted to receive that sum in full of such share; this, as there was no fraud in the transaction, was held in equity to be a good bar of the custom<sup>2</sup>. So, if A, who is of age, marry a freeman's daughter, who is an infant, he may, on receiving an adequate portion, bar himself of any future right to the customary estate in virtue of the marriage, by a release of all future right, or by a covenant to release it, when it shall accrue<sup>3</sup>. Indeed, if the latter mode be adopted, the wife, if under age, would not be barred by the covenant; and, in case of his death before the execution of the release, she would, by survivorship, be entitled to her share, as a *chose* in action not recovered or received by her husband; but, if he be living when the right accrues, as he clearly may release it, and his release will bind her, therefore it is reasonable he should perform his covenant. It is highly expedient, that articles of this nature should be carried

<sup>1</sup> 1 P. Wms. 636, 639.

<sup>2</sup> 1 P. Wms. 371.

<sup>3</sup> 1 Eq. Ca. Abr. 371. 372. 373.

<sup>4</sup> 1 P. Wms. 372. 1 Ask. 43.

m 1 Atk. 63.

n 2 Atk. 160.

1 P. Wms. 639.

o 1 Atk. 63.

402. 1 Atk. 161.

1 P. Wms. 639.

2 P. Wms. 273.

carried into execution; and that, when the father is bountiful to his children in his lifetime, he should have his affairs settled to his satisfaction at his death<sup>m</sup>. But such release shall be altogether ineffectual, if in any manner extorted, or obtained by undue influence<sup>n</sup>, or without consideration<sup>o</sup>.

These points are, indeed, less likely to occur in consequence of the authority given to a freeman by the above mentioned stat. *Geo. 1.* of disposing by will, of his whole personal estate, without regard to the custom.

### S E C T. III.

#### *Of distribution by the custom of York—and of Wales*

THE custom of York, as it regards the widow varies from that of London only in this respect that she is allowed to reserve her own use not only her apparel, and furniture of her chamber but also a coffer or box containing various ornaments of her person, as jewels, chains, and other articles of the like nature<sup>a</sup>.

a Off. Ex.

Suppl. 61, 62.

Swinb. p. 6.

l. 9.

As relative to children, the custom of York differs in two material points from the custom of London. In the city, as we have seen, a child's orphanage part is not fully vested, till he attain

the age of twenty-one. In the province it is vested immediately on the death of the intestate<sup>b</sup>. In the city, we may remember, the advancement of a child cannot arise out of a real estate. In the province the heir at common law, who inherits any land either in fee or in tail, is divested of all claim to any filial portion<sup>c</sup>. And, however small in point of value the land may be in comparison with the personal estate, he is nevertheless excluded<sup>d</sup>; and even although the estate he inherits be only a reversion<sup>e</sup>. He is also barred, though the land devolved upon him by settlement made on his father's marriage<sup>f</sup>. Nor in case lands held by a mortgage in fee descend to him before redemption, shall he be entitled to a filial portion; but on redemption of the mortgage, and payment of the money to the administrator, it seems he shall be entitled to such portion, because then he has nothing by inheritance, nor, in fact, has had any preferment<sup>g</sup>.

b 2 Bl. Com.  
519. 4 Burn  
Ecc. L. 398.

c 4 Burn Ecc.  
L. 409. L. of  
Test. 227.  
2 Vern. 375.  
d 4 Burn Ecc.  
L. 409.

e 4 Burn Ecc.  
L. 409, 410.  
f 4 Burn Ecc.  
L. 410.  
2 Vern. 375.

g 4 Burn Ecc.  
L. 410.

The principles established in regard to advancement on the construction of the statute of distributions apply in general to such as is pursuant to the custom of this district<sup>h</sup>; but as here land as well as money constitutes an advancement, the heir at law under the custom is excluded by his inheritance of land, either in fee or in tail<sup>i</sup>; whereas such inheritance is no bar by the statute; but, as well under the custom, as under the statute, younger children, in respect to advancement, are on the same footing. It is essential in order to the custom of York's attaching, that the intestate should

h Vid. 1 Ves. 17.

i 2 Vern. 375.

be resident at the time of his death within the province; but for that purpose it is immaterial where his estate is situated.

In case a freeman of London shall die within the province, the custom of the city for the distribution of his effects shall prevail, and shall controul the custom of the province of York. Therefore in that case the heir shall come in for a share of the personal estate: for the custom of the province is only local, and circumscribed to a certain district; but that of London, as above stated, follows the person, although ever so remote from the city.

k 4 Burn Eccl.  
L. 416.  
2 Vern 47, 82.  
Supr. 310.

With these distinctions the customs of London and those of York in the main agree, and appear to be substantially the same.

1 2 Bl. Com.  
519. 1 Vern.  
134, 200, 305,  
432, 465.  
2 Ch. Rep. 255.  
L. of Test. 221,  
222.

Thus, if an intestate in the province of York be seized of an estate in fee simple, leaving a widow and three sons. The widow in that case shall have one-third of the whole personal estate under the custom; the other third shall be divided equally between the two younger sons, and of the remaining third the widow shall take one-third under the statute, and the other two-thirds shall be divided equally among the three sons; for the heir is barred merely of his copart, but not of his share by the statute.

m 4 Burn Eccl.  
L. 424. Off.  
Ex. 97. in not.  
ibid. Suppl. 72.  
a Supr. 307.

In respect to Wales<sup>m</sup>, we may learn in general from the stat. 7 and 8 W. 3. c. 38. above referred to<sup>n</sup>, that the doctrine of the *pars rationabilis* extends to intestate's effects within that principality. But the books contain no farther information on the subject.



## C H A P. VIII.

## THE POWERS AND DUTIES OF LIMITED ADMINISTRATORS.—OF JOINT ADMINISTRATORS.

THERE are certain powers and duties which belong in common to all special and limited administrators. Whether the administration be committed *durante minoritate*, *durante absentia*, or *pendente lite*, or whether such special and limited administration be granted with or without a will annexed, or in a general or restrictive form only, *ad usum*, *et commodum infantis*, they are all interested in some respects with the same authority. They may perform all such acts as cannot be delayed without prejudice or danger to the estate. They may sell *bona peritura*, cattle which are fattened, grain, fruit, or any other substance, which may be the worse for keeping<sup>b</sup>. They may pay debts which were due from the deceased at the time of his death<sup>c</sup>, or for the payment of them they may dispose of effects not perishable<sup>d</sup>. They may also in such respective characters receive debts due to the deceased<sup>e</sup>, or may maintain actions for the recovery of the same<sup>f</sup>; for, in all these and the like instances, the urgency of the case requires them immediately to act. They have also, it seems, the privilege of retaining for debts owing to themselves<sup>g</sup>.

a 2 P. Wms.  
576.

b 3 Bac. Abr. 13.  
11 Vin. Abr.  
102, 103.

1 Roll. Abr.  
910, 3 Leon.  
278. 2 Anderf.  
132. pl. 78.

Cro. Eliz. 718.  
5 Co. 29.  
Godb. 104.

c Com. Dig.  
Admon. F.  
Vid. Hob. 250.  
5 Co. 29. b.

d 5 Co. 29. b.  
2 Anderf. 132.  
pl. 78.

e Com. Dig.  
Admon. F.  
Vid. 3 Leon.  
103. ■

f 2 P. Wms.  
576. 1 Roll.  
Abr. 882.  
2 Brownl. 83.  
1 Salk. 42.

g Com. Dig.  
Admon. F.  
Semb. Raym.

If 483.

h 6 Co. 67. b.  
Off. Ex. 215.

i Off. Ex. 215.  
5 Co. 29. b.

k 6 Co. 67. b.  
Off. Ex. 215.

l Off. Ex. 215.

m 2 Anderf.  
332 pl. 78.  
n 5 Co. 29. b.  
o 1 Roll. Abr.  
910, 911.

p Vid. supr.  
226.

If administration be granted generally during infancy, the grantee has authority to make leases of any term vested in the infant executor, which shall be good, till he come of age, and, as it has been also held, till he enter<sup>h</sup>. Such administrator has also, it seems, a right, in case the administration were granted with the will annexed, to assent to a legacy<sup>i</sup>. But if the administration were committed with special words of restraint in the form I have just mentioned, such administrator is incapable of making leases<sup>k</sup>, or of assenting to a legacy<sup>l</sup>. Nor shall the power of an administrator, during infancy, although the grant were general, extend to the prejudice of the infant. Therefore such administrator has no authority to transfer the property by sale, except in cases of necessity; nor to sell leases even for the payment of debts, if there be no other property which he may dispose of to more advantage<sup>m</sup>; nor to assent to a legacy, unless there be assets for its payment<sup>n</sup>, nor to release a debt without actually receiving it<sup>o</sup>; for although, as we may remember, if A. an infant, be appointed executor, and B. be nominated to act in that character during A.'s minority, B. seems to be possessed of the same powers as an absolute executor<sup>p</sup>; yet a distinction has been taken between him and an administrator *durante minoritate*. To B. the property in the effects was confided by the owner himself, though but for a limited time and in a special manner, whereas such administrator is appointed by the ordinary in consequence of the legal disability

disability of the executor, who by the will is constituted to act immediately<sup>1</sup>. Such acts, therefore, as are performed by such administrator, to the injury of the infant, shall be altogether ineffectual.

q Off. Ex. 315,  
116. 11 Vin.  
Abr. 103.

By the stat. 38 Geo. 3. c. 87. s. 7. an administrator *durante absentia* has the same powers vested in him as an administrator during the minority of the next of kin.

An administrator *pendente lite*, whether the suit relates to a will, or the right of administration, seems to be on the same footing with an administrator during infancy, to whom the grant is made in the special and limited manner above mentioned<sup>2</sup>.

r Vid. 3 Bac.  
Abr 36.  
11 Vin. Abr.  
106. 2 P. Wms.  
576. & supr. 74.

If an action be brought against a special administrator, and, pending the action, the administration determine, it has been held, he ought to retain assets to satisfy the debt, which is attached on him by the action<sup>3</sup>, but that is on the supposition the action does not in that event abate, whereas it seems that such would be the consequence<sup>4</sup>. If judgment be obtained against such administrator, and afterwards the executor come of age, a *scire facias* will clearly lie against the executor on the judgment<sup>5</sup>.

3 Bac. Abr.  
14. Comb. 463..

t 11 Vin. Abr.  
97. Moore 462.  
Goldsb. 136.  
Lutw. 342.

u Ld. Raym.  
265. Carth. 431.

Of co-executors, we have seen, the acts of any one, in respect to the administration of the effects, are

are

are deemed by the law to be the acts of all, inasmuch as they have a joint and entire authority over the whole property; but joint administrators are considered in a different light. Their power arises not from the act of the deceased, but from that of the ordinary; and administration, it has been already stated, is in the nature of an office, and, if granted to several persons, they must all join in the execution of it, nor shall the act of one only be binding on the rest. Therefore, one or several administrators cannot, like one of several co-executors, convey an interest, or release a debt without the others'.

s Supr. 84.

t 4 Burn Eccl.  
L. 272. Lord  
Bacon's Tracts  
162. 1 Atk. 460.

u 2 Vern. 314.  
Supr. 84.

But if one of the administrators die, the right administering will survive without a new grant.

By the stat. 38 Geo. 3. c. 87. s. 4. in case of the absence of an executor for a year after the testator's death, out of the jurisdiction of his majesty's courts, and a suit be instituted in a court of equity by a creditor, the court in which the suit shall be pending, is empowered to appoint persons to collect in outstanding debts, or effects due to the testator's estate, and to give discharges for the same who are to give security in the usual manner due to account.



## C H A P. IX.

OF ASSETS AS DISTINGUISHED INTO REAL AND PERSONAL, LEGAL AND EQUITABLE—OF MARSHALLING ASSETS.

IN treating of debts and legacies I have hitherto supposed them to be payable out of the personal estate only, and, indeed, that is the natural fund for their satisfaction: but the real property may also be applied to the same purpose.

On the subject of such application it is necessary to consider assets under different denominations. Assets then are either real or personal, legal or equitable<sup>a</sup>.

<sup>a</sup> Vid. 4 Burn.  
Eccl. L. 288.

Those of which I have been treating are legal and personal.

I proceed now to advert to such as are legal and real. Lands descended to the heir in fee simple are for the benefit of specialty creditors of this description, as is even an advowson which is so descended<sup>b</sup>.

<sup>b</sup> 3 Wooddes.  
483. 3 P. Wms:  
491.

These assets are sometimes styled assets by descent, as personal assets are called assets *inter mains*, that is, in the hands of the executor<sup>c</sup>.

<sup>c</sup> Terms of the  
Law.

Whether

Whether an estate *pur autre vie*, in case it be not devised, shall be real or personal assets, depends on there being or not being a special occupant. The statute of frauds enables the proprietor of such estate to devise it, and enacts that if no devise be made, it shall be chargeable in the hands of the heir, if it come to him by reason of a special occupancy, as assets by descent, as in the case of lands in fee simple. And, if there be no special occupant, it shall go to the executor, and be assets in his hands<sup>d</sup>.

d 2 Fonbl. 2d edit. 396.  
not. b. 3 Atk. 466. 4 Term. Rep. 229.

e Supr. 105, 106.

f 2 Fonbl. 2d edit. 114.  
not. (r.)

g 2 Fonbl. 2d edit. 114.  
not. (s.)  
Hardr. 489.  
1 Term Rep. 766.

h Vid. 2 Bl. Com. 378.

A term in gross is, as we have seen, personal assets<sup>e</sup>. But, if the term be vested in a trustee, and attendant on the inheritance, it is real assets<sup>f</sup>. So a term in trust, attendant on the fee in trust, shall be real assets in the hands of the heir; for the statute of frauds having made a trust in fee assets in the hands of the heir, the term which follows the inheritance, and which is subject to all charges attending the inheritance, must be so also<sup>g</sup>.

Creditors by specialties, which affected the heir provided he had assets by descent, had not the same remedy against the devisee of their debtors, and were, therefore, liable to be defrauded of their securities. To obviate this mischief<sup>h</sup>, the statute 3 W. & M. c. 14. has enacted, that all devises of real estates by tenants in fee simple, or having power to dispose by will, shall, as against such creditors, be deemed to be fraudulent and void, and that they may maintain their actions jointly against

against the heir and devisee. But devises for payment of debts, and for raising portions for younger children, in pursuance of an agreement before marriage, are expressly excepted by the statute<sup>1</sup>. And thus, freehold interests devised for other than the just purposes aforesaid, are become, in favour of specialty creditors, real assets at law, without the assistance of a court of equity; in respect to which such creditors may elect to resort in the first instance against the heir and devisee, without suing the personal representative of their deceased debtor<sup>2</sup>.

<sup>1</sup> Vid. 1 Ark.  
292. 2 Vef 398.  
1 Bro. Ch. Rep.  
311. 2 Bro. Ch.  
Rep 514.  
Com. Dig.  
Assets A.

<sup>2</sup> 3 Wooddes.  
486.

It seems, also, that an estate *pur autre vie*, although no special occupant were named, would, in case it were devised, be considered as real assets<sup>3</sup>.

<sup>3</sup> Vid. 2 Fonbl.  
2d edit. 396.  
not. b.

But copyhold estates are not assets in the hands of the heir<sup>4</sup>, and, consequently, are not comprehended within the provisions of this statute.

<sup>4</sup> 4 Co. 32.  
Robinson v.  
Tenge, cited  
1 P. Wms. 679.  
not. 1.

Between legal and equitable assets the distinction is this: legal assets are such as constitute the fund for the payment of debts according to their legal priority; whereas equitable assets are those which can be reached only by the aid of a court of equity, and are subject to distribution on equitable principles, according to which, as equity favours equality, they are to be divided *pari passu* among all the creditors<sup>5</sup>.

<sup>5</sup> 3 Bac Abr.  
39. in not.  
2 Fonbl. 402.  
not d. 4 Burn  
Eccl. L. 288.  
3 Wooddes.  
486. 2 P. Wms.  
416. not. 2.

By

By the stat. 21 H. 8. c. 5. s. 5. it is enacted that if lands are devised to be sold, neither the money produced by the sale, nor the future profit of the land, shall be considered as forming a part of the personal estate of the devisor. But this provision was formerly construed to apply merely to devises of lands to be sold by persons not executors, or by executors in conjunction with other persons; in which cases it was held, that neither the land, nor the money was to be regarded as legal assets, but merely subject to an equitable appointment, inasmuch as the parties empowered to sell were not trusted with it, in respect of the executorship<sup>k</sup>.

k 4 Bac. Abr.  
58. Roll. Abr.  
920. Hob. 265.  
Dyer 151. b.  
264. b. 1 Vern.  
63. 2 Vern. 405.  
4 Burn Eccl. L.  
160 21 Vin.  
Abr. 29.  
Prec. Chan.  
127. Sed vid.  
Off. Ex. 74, 75.

That, in case lands were devised to an executor to be sold by him in that capacity, for the payment of debts and legacies, the money arising from the sale should be legal assets as well as the intermediate profits; for that, by the devise, the devise was broken, and the estate in the land vested in the executor, *quā* executor for the purposes directed by the will<sup>l</sup>.

l 3 Bac. Abr. 58.  
1 Roll. Abr.  
920. Hargr.  
Co Lit. 236.

But the doctrine of equitable assets, in its principle so consonant to natural justice, has been gradually extended; and this distinction between a devise to a trustee and to an executor has been continually qualified, till at length it appears to be altogether abolished.



In one class of cases, both of an earlier and of a later date, courts of equity recognising the union of the two characters of trustee and of executor in the devisee, regarded on that ground the real estate, as merely a trust fund, and distributed among all the creditors equally<sup>m</sup>. And other cases considered it in the same light, although the devise were not to the executor expressly on trust, if according to the sound construction of the will, he might be converted into a trustee, as if the devise were to him and his heirs; since the money could never be legal assets in the hands of his heir: nor against such heir could an action be maintained by a creditor<sup>n</sup>.

m 2 P. Wms.  
416. not 2.  
2 Fenbl 402.  
403. 2 Vern.  
133 Prec.  
Cham. 408.  
Mosc. 123.  
328. 2 Atk. 50.  
2 Bro. Ch. Rep.  
94.

n 1 Bro. Ch.  
Rep. Append.  
7. 1 Bro. Ch.  
Rep. 135. 138.  
in not.

According to other decisions, if the executor had only a naked power to sell in the capacity of executor, the lands descended in the mean time to the heir of the devisor; and, till the sale, he might enter and take the profits<sup>o</sup>; and the money arising from such sale, was held to be assets at law<sup>p</sup>.

o Co. Litt. 236.

p 1 Bro. Ch.  
Rep. 135. 138.  
in not.

But, by modern adjudications, it seems to be established, that a devise to a mere executor shall bear the same construction as a devise to a trustee: that there is no reason to suppose the testator's meaning to be different in the one instance from that in the other: and, that even in the case of a mere power on the part of the executor to sell, the descent seems to be broken, inasmuch as the vendee is in by the devisor; but, that whether the descent in such case be broken or not, the assets shall be equally

equally equitable; in short, that if the real estate be, by any means, given to the executor, the produce of it when sold, shall not be applied in the course of legal administration, but be distributed as equity prescribes <sup>1</sup>.

q 1 Bro. Ch. Rep. 137, 138.  
2 Fombl. 2d edit. 398 in not. Vid. Hargr. Co. Litt. 113. & not. 2.

r 1 P. Wms. 430. 2 Atk. 290. 1 P. Wms. 416. not. 2.

s 2 Fombl. 2d edit. 398 in not. 1 Bro. Ch. Rep. Append. 6. 2 Bro. Ch. Rep. 94.

t 2 Atk. 294.  
3 P. Wms. 342. Ambl. 308.  
3 Bac. Abr. 59 in not.

u 3 P. Wms. 342. Ambl. 308.

And, although it has been held, that where the estate descends to the heir charged with the payment of debts, it will be legal assets in him <sup>2</sup>; yet now the idea seems to prevail, that in this instance also, the assets shall be deemed to be equitable.

But, such assets as are clearly legal, shall assume, by being recoverable only in equity, an equitable nature. Hence, if a mere trust estate descend on the heir at law, notwithstanding necessity of resorting to equity to reduce it into possession, yet it shall be legal assets, since a trust estate is made assets by the statute of frauds. And although an equity of redemption of a mortgage in fee, not being made assets by any legislative provision, has been considered as merely as equitable interest, and has been expressly adjudged to be equitable assets <sup>3</sup>: Yet, there are strong opinions to the contrary; and, that an equity of redemption even in fee, though capable of being reached only in equity, shall be classed among assets at law. And, although from the same inclination of extending the idea of equitable assets, it has been held, that if a term for years mortgage has terminated, the equity of redemption shall be of that description of assets <sup>4</sup>. Still, according to a variety of antecedent

antecedent

precedent cases, such chattels, whether real or personal, as are mortgaged or pledged by the testator, and redeemed by the executor, although liable of being recovered only in equity, shall be assets at law in the hands of the executor, for the value beyond the sum paid for the redemption \*.

W 3 Bac. Abr.  
59 in not.  
1 Leon 155;  
Moore 858.  
1 Roll. Rep.  
158. 1 Brownl.  
76. 1 Atk. 291.

Lands may be devised to an executor to be sold for him for the payment of debts only, and then they shall be assets merely for that purpose. And, the devise may be expressed to be for the payment of legacies and not of debts; and then it will be restricted to the former. For, since the lands are not in their own nature assets, but converted so by the will and disposition of the devisor, they shall not be assets to a greater extent than he has thought fit to direct \*.

2 Off. Ex. 74.

But, in either of these cases, as I shall presently show, the assets may be marshalled.

Where money by a marriage agreement is directed to be invested in land, and settled, such land shall be bound by the articles, and not be assets, either at law or in equity, for payment of debts \*.

7 3 P. Wms.  
217.

The marshalling of assets remains now to be considered.

The personal assets of the testator shall in all cases be primarily applied in discharge of his personal debts



a 1 P. Wms.  
294 not. (1).  
2 Atk 624, 625.  
3 Atk. 202.  
3 P. Wms. 324.  
1 Bro. P. C. 192.  
Dunb. 302.  
Ambl. 33.  
1 Will. 82. S. C.  
1 Bro. Ch. Rep.  
144. 454.  
Prec. Chm.  
101. 2 Vern.  
718. Ambl.  
581. S. C.  
1 Bro. Ch. Rep.  
145 456, 457.  
2 Bro. Ch. Rep.  
60 Vid also  
3 Fac. Abr. 85.  
2 Fonbl. 290.  
not. (2).  
b Bunb. 301.  
3 Atk. 202.  
3 P. Wms. 322.  
2 E q. Ca. Abr.  
493.  
c 2 Salk. 449.  
1 P. Wms. 291.  
1 Vern. 36.  
3 P. Wms. 360.  
2 Atk 436.  
1 Vef. 351.  
6 Bro. P. C.  
520 2 Bro. Ch.  
Rep. 273  
d 1 Atk. 487.  
1 Bro. Ch. Rep.  
240.  
e 2 P. Wms.  
366.

f 2 Atk. 424.  
g 1 P. Wms.  
505 2 Bro.  
P. C. 1.  
h 2 P. Wms.  
222 457. 664.  
is not. 2 Bro.  
Ch. Rep. 316.  
454. 1 Vef. 51.  
Ambl. 150.

debts, or general legacies, unless he exempt them by express words, or manifest intention<sup>a</sup>.

A devise of all the real estate subject to the payment of debts will not alone exonerate the personal estate; and even if the testator direct the real estate to be sold for the payment of debts, the personal estate shall be applied in exoneration of the real<sup>b</sup>; and it shall be thus applied, although the personal debt be secured by mortgage, and whether there be, or be not, a bond or covenant for payment<sup>c</sup>. So, lands subject to, or devised for payment of debts shall be liable to discharge such mortgaged lands, either descended, or devised<sup>d</sup>; and, although the mortgaged lands be devised expressly subject to the incumbrance<sup>e</sup>. So lands descended shall exonerate mortgaged lands devised<sup>f</sup>. So, unincumbered lands, and mortgaged lands, both being specifically devised, be expressly after payment of *all* debts, shall contribute to the discharge of the mortgage<sup>g</sup>. In these cases the debt is considered as the personal debt of the testator himself, and therefore a charge on the real estate merely collateral.

But a different rule prevails, where the charge on the real estate principally, and the personal security is only collateral<sup>h</sup>: As, where a husband on his marriage covenants to settle lands, and to raise a term of years out of them for securing portions, and also gives a bond for the performance of the covenant; for in such case the land hold



older enters into such covenant relying on the  
and to enable him to discharge it; nor does  
the money raised increase the personal estate, but  
to exonerate the rest of his real<sup>1</sup>. So, where  
the debt, although personal in its creation, was  
contracted originally by another<sup>1</sup>. As where an  
estate is bought, subject to a mortgage, the per-  
sonal estate of the purchaser shall not be applied in  
exoneration of the real estate, unless he appeared  
to have intended to make the debt his own<sup>2</sup>; but  
a mere covenant for securing the debt will not be  
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h 2 Fonbl. 292.  
not. (b).  
2 P. Wms. 435.  
2 Salk. 449.  
1 P. Wms. 347.  
1 Vel. 31. 252.  
312 Ambl. 225.  
2 P. Wms. 664.  
in not. 1 Bro.  
Ch. Rep. 57. 52.  
2 Bro. Ch. Rep.  
101. 152. 604.  
k 2 Fonbl. 202.  
not (b)  
1 Vern. 36.  
6 Bro. P. C. 520.  
2 Bro. Ch. Rep.  
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With respect to the priority of the application  
of real assets, when the personal estate is either  
exempt or exhausted, it seems, that first, the real  
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estate specifically devised subject to a general charge  
of debts<sup>m</sup>.

1 2 P. Wms. 664.  
Ambl. 171.  
1 Bro. Ch. Rep.  
57. 2 Bro. Ch.  
Rep. 152. 604.

m 1 E Wms.  
294. not. 1.  
2 Atk. 424.  
3 Atk. 566.  
2 Bro. Ch. Rep.  
257. 261. in  
not. 259. in not.

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long settled, and where A. a creditor, has more  
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n 1 P. Wms.  
679. not. (1).  
2 Atk. 446.  
1 Vel. 313.  
2 Vel. 53.

2 Ch. Ca. 4.  
 1 Vern. 455.  
 1 Eq. Ca. Abr.  
 144. 2 Vern.  
 763. 2 Atk. 436.  
 3 Wooddef.  
 489.

satisfaction out of the personal assets; a simple contract creditor shall stand in the place of such specialty creditor against the real assets, so far as the latter shall have exhausted the personal assets in payment of his debt.

3 P. Wms.  
 323.

The same marshalling of assets may also take place in favour of legatees. As against assets descended, they shall have the same equity. Thus where lands are subjected to the payment of debts, a legatee shall stand in the place of a simple contract creditor, who has been satisfied out of the personal assets. So, where legacies by will are charged on the real estate, but not the legacies by the codicil, the former shall resort to the real assets on a deficiency of such as are personal to pay the whole.

3 Ch. Rep. 83.  
 1 P. Wms 422.  
 2 P. Wms 620.

But the principles of these rules will not admit of their being applied in aid of one claimant, so as to defeat another. And therefore a pecuniary legatee shall not stand in the place of a specialty creditor, as against lands devised, although he shall stand as against lands descended. Yet such legatee shall stand in the place of a mortgagee, who has exhausted the personal assets, to be satisfied out of the mortgaged premises though specifically devised; for the application of the personal assets in ease of the real estate mortgaged does not take place to the defeating of any legacy.

1 P. Wms.  
 678. 3 P. Wms.  
 324.  
 3 Ca. Temp.  
 Talb. 53.  
 Ambler 171.  
 1 Vid. 1 P.  
 Wms. 294.  
 1 P. Wms.  
 693. 730.  
 2 P. Wms. 190.  
 335.

Nor do any of the rules above mentioned subject any fund to a claim to which it was not before

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able, but only provide that the election of one claimant shall not prejudice the claims of the others. Thus, where A. seised of freehold, and copyhold lands, mortgaged them in his lifetime, and died indebted by mortgage, and on several bonds; the specialty creditors urged the court in marshalling the assets to cast the whole mortgage upon the copyhold estate, in order that the specialty creditors might have the benefit of the whole freehold estate: Yet the court held, that as the copyhold estates were not liable either at law, or in equity to the testator's debts farther than he subjected them to the same, the copyhold estate should bear its proportion with the freehold estate for payment of the mortgage, but should not be liable to make satisfaction for the specialty debts.

z Robinson v. Tonge, cited 1 P. Wms. 679. not. 1.

If a legacy be given out of a mixed fund of real and personal estate, payable at a future day, and the legatee die before the day of payment, it is doubtful whether the court will marshal the assets, as to turn such legacy on the personal estate; in which case, it would be vested and transmissible; but, as against the real estate, it would sink by the death of the legatee.

a 1 Atk. 482. & Pearce v. Taylor, before Lord Thurlow, C. Trin. vac. 1790 cited 1 P. Wms. 679. not. 1.

As against real assets descended, the wife shall stand in the place of specialty creditors for the amount of her paraphernalia; but, whether she shall be so entitled as against real assets devised, is a point unsettled.

b 1 P. Wms. 729. 3 Atk. 369. 393. c 2 P. Wms. 544. not. 1. Ambl. 6. 3 Atk. 438. 3 Bac. Abr. 27. 2 Vef. 7 Vid. *supr.* 130.

Z

A court



- a 1 P. Wms. 294. not. (1).
- 2 Atk 624, 625.
- 3 Atk. 202.
- 3 P. Wms. 324.
- 1 Bro. P. C. 192.
- Bunb. 302.
- Ambi. 33.
- 1 Will 82. S. C.
- 1 Bro. Ch. Rep. 144, 454.
- Proc. Chm. 101. 2 Vern. 718. Ambi. 581. S. C. 1 Bro. Ch. Rep. 145 456, 457.
- 2 Bro. Ch. Rep. 60. Vid also 3 Pac. Abr. 85.
- 2 Foulb. 290. not. (2).
- b Bunb. 301.
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- 3 P. Wms. 322.
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- 2 Atk 436.
- 1 Vef. 151.
- 6 Bro P. C. 520 2 Bro. Ch. Rep. 273
- d 1 Atk. 487.
- 1 Bro. Ch. Rep. 240.
- e 2 P. Wms. 366.
- f 2 Atk. 424.
- g 1 P. Wms. 505 2 Bro. P. C. 1.
- h 2 P. Wms. 222 437. 664.
- in not. 2 Bro. Ch. Rep. 316.
- 454. 1 Vef 51.
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1 2 Fonbl. 292.  
not. (b).  
2 P. Wms. 415.  
1 2 Salk. 449.  
1 P. Wms. 347.  
1 Vef. 31. 251.  
312. Ambl. 115.  
2 P. Wms. 664.  
in not. 1 Bro.  
Ch. Rep. 57, 58.  
2 Bro. Ch. Rep.  
101, 152, 604.  
k 1 Portbl. 202.  
not (b)  
1 Vern. 36.  
6 Bro. P. C. 520.  
2 Bro. Ch. Rep.  
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 3 Wooddell.  
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satisfaction out of the personal assets, a simple contract creditor shall stand in the place of such specialty creditor against the real assets, so far as the latter shall have exhausted the personal assets in payment of his debt.

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The same marshalling of assets may also take place in favour of legatees. As against assets descended, they shall have the same equity. Thus where lands are subjected to the payment of debts, a legatee shall stand in the place of a simple contract creditor, who has been satisfied out of the personal assets. So, where legacies by will are charged on the real estate, but not the legacies by the codicil, the former shall resort to the real assets on a deficiency of such as are personal to pay the whole.

3 Ch. Rep. 83.  
 1 P. Wms. 422.  
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1 P. Wms.  
 678. 3 P. Wms.  
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 2 Ca. Temp.  
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 2 P. Wms. 190.  
 335.

But the principles of these rules will not admit of their being applied in aid of one claimant, so as to defeat another. And therefore a pecuniary legatee shall not stand in the place of a specialty creditor, as against lands devised, although he stands as against lands descended. Yet such legatee shall stand in the place of a mortgagee, who has exhausted the personal assets, to be satisfied out of the mortgaged premises though specifically devised; for the application of the personal assets in ease of the real estate mortgaged does not take place to the defeating of any legacy.

Nor do any of the rules above mentioned subject any fund to a claim to which it was not before liable.

able, but only provide that the election of one claimant shall not prejudice the claims of the others. Thus, where A. seised of freehold, and copyhold lands, mortgaged them in his lifetime, and died indebted by mortgage, and on several bonds; the specialty creditors urged the court in marshalling the assets to call the whole mortgage upon the copyhold estate, in order that the specialty creditors might have the benefit of the whole freehold estate: Yet the court held, that as the copyhold estates were not liable either at law, or in equity to the testator's debts farther than he subjected them to the same, the copyhold estate should bear its proportion with the freehold estate for payment of the mortgage, but should not be liable to make satisfaction for the specialty debts.

u 2 Atk. 438.  
1 Ves. 372.

2 Robinson v.  
Tonge, cited  
1 P. Wms. 679.  
not. 1.

If a legacy be given out of a mixed fund of real and personal estate, payable at a future day, and the legatee die before the day of payment, it is doubtful whether the court will marshal the assets, as to turn such legacy on the personal estate; in which case, it would be vested and transmissible; but, as against the real estate, it would sink by the death of the legatee.

a 1 Atk. 482.  
& Pearce v.  
Taylor, before  
Lord Thur-  
low, C.  
Trin. vac.  
1790 cited  
1 P. Wms. 679.  
not. 7.

As against real assets descended, the wife shall stand in the place of specialty creditors for the amount of her paraphernalia; but, whether she shall be so entitled as against real assets devised, is point unsettled.

b 1 P. Wms.  
729. 3 Atk.  
369. 593.  
c 2 P. Wms.  
544. not. 1.  
Ambl. 6.  
3 Atk. 438.  
3 Bac. Abr. 87.  
2 Ves. 7 Vid.  
supr. 120.

Z

A court



d 2 Vef. 52.  
Ambl. 614.  
704. 713.  
3 Wooddell.  
489. not. (g).

A court of equity will not marshal assets in favour of a charitable bequest, so as to give it effect out of the personal chattels, it being void so far as it touches any interest in land.



## CHAP. X.

## OF A DEVASTAVIT.

**H**AVING thus discussed what belongs to the discharge of an executor's duty, I am now to consider, what shall amount to such a violation, or neglect of it, as shall make him personally responsible.

This species of misconduct is styled in law a *devastavit*, that is, a wasting of the assets<sup>a</sup>.

<sup>a</sup> Off. Ex. 157.  
<sup>3</sup> Bac. Abr. 77.  
 Com. Dig.  
 Admon. I. 1.  
 11 Vin. Abr.  
 306.

An executor may incur this charge in a variety of modes, not only by plain and palpable acts of abuse, as giving away, embezzling, or consuming the property without regard to debts, or legacies; but also by misapplying it in extravagant expences at the funeral<sup>b</sup>; in the payment of debts out of their legal order, to the prejudice of such as are superior; or by an assent to, or payment of a legacy, when there is not a fund sufficient for creditors<sup>c</sup>.

<sup>b</sup> Vid. *supr.* 192.

<sup>c</sup> Off. Ex. 158.

So if the executor release, or cancel a bond due to the testator, or deliver it to the obligor, this shall charge him to the amount of the debt, whether in point of fact he received it or not<sup>d</sup>. If he release a

<sup>d</sup> Off. Ex. 159.

e Off. Ex. 71.  
159. Hob. 66.  
Andr. 138.  
Cro. Eliz. 43.

f Off. Ex. 71.  
159, 160.  
3 Leon. 51.

g Yelv. 10.  
2 Lev. 189.  
Keilw. 53.

h 2 Lev. 189.  
2 Jon. 88. S. C.  
1 Vern. 474.

i 3 Bac. Abr. 78.  
in not. et  
vid. 1 Vern.  
474.

k Hob. 167.  
Noy. 129.

whether before, or subsequent to the testator's death; this also will be a *devastavit* \*. If he submit to arbitration, a debt, or any other demand he may be entitled to in right of the testator, and the arbitrator do not award him a recompence to the full value, this, as being his own voluntary act, shall bind him to answer the difference †. If an executor take an obligation in his own name, for a debt due by simple contract to the testator, he shall be equally chargeable as if he had received the money; for the new security has extinguished the old right, and is *quasi* a payment ‡. If, in the character of an executor, he commence an action, in which he has a right to recover, and afterwards agree with the defendant to receive a specific sum at a future day, as a compensation, and the party fail to pay it, the executor, in that case, is liable on a *devastavit* for the value §. Thus, where the executor of an obligee took in payment a bill of exchange, drawn on a banker, for the money, who accepted the bill, and before payment failed: on the executor's afterwards bringing an action on the bond, and this matter being disclosed in evidence, it was held to be a payment ¶. So, if an executor pay money in discharge of an usurious bond, or any other usurious contract entered into by the testator, it shall involve him in the same consequences †.

Such acts also of negligence, and careless administration, as tend to defeat the rights of creditors or legatees, fall under the same denomination. A

If the executor delay the payment of a debt, payable on demand with interest, and suffer judgment for principal and interest incurred after the testator's death; unless he can shew that the assets were insufficient to discharge the debt immediately, he shall be held guilty of a *devastavit*.

1 2 Lev. 401

If an executor lose any of the testator's chattels, he shall be responsible for their value. And, in a case where the executor had lost a bond due to the testator, the court of chancery was inclined to charge him with the debt; but, directed only, that he should prosecute a suit instituted by him against the obligor, with effect, in order to recover the money on the bond, and respited judgment in the mean time. If the executor apply merely by an attorney to the obligor of a bond to pay the debt, but bring no action, he shall be charged with the amount of it. He shall, in like manner, be personally answerable, if, by delaying to commence an action, he has enabled a creditor of the testator to avail himself of the statute of limitations.

m Vid. 2 Vern. 299.

n 2 Vern. 299.

o 3 Bac. Abr. 60.  
2 Bro. Ch. Rep. 156.

p 12 Mod. 573.  
11 Vin. Abr. 309.

If an executor appoint an agent to collect the testator's effects, and the agent embezzle them, it shall be a *devastavit* by the executor. If a term be assigned by an executor in trust, to attend an inheritance, it shall, in equity, follow all the estates created out of such inheritance, and all the incumbrances subsisting upon it; but, as by such assignment, the term ceases to be assets at law, the executor shall be responsible to the creditors for a *devastavit*.

q 6 Mod. 93.

r 3 P. Wms. 330. 1 Term Rep. 763.



If an executor retain money in his hands for any length of time, which, by application to the court of chancery, or, by vesting in the funds, he might have made productive, he shall be charged with interest upon it'.

s 2 Fonbl. 1d edit. 184.

not. p. 2 Vern.

744. 1 Bro.

Ch. Rep 375.

3 Bro. Ch. Rep.

73. 433.

t Off. Ex. 158.

u 6 Mod. 181.  
182.

w 6 Mod. 181.

x 6 Mod. 181.

y 6 Mod. 181.

z 2 Fonbl. 1

2d edit. 184.

not. p. 3 Bro.

Ch. Rep 147.

433. Vid. also

2 Bro. Ch. Rep.

231.

If he sell the testator's good at an under value, although it be an appraised value'; or, if he delay disposing of them, by which they are injured, he is personally bound to make a compensation. If he omit to sell the goods at their full price, and, afterwards, they are taken out of his hands, he shall be liable to the extent of the value of the goods, and not merely to what he recovers in damages; for there was a default on his part. But if, without any imputation on him, the goods are taken out of his possession, although he recover not such damages, as the goods were really worth, he shall be responsible for no more than he recovers. If the goods be perishable, and, on his part, there has been neither neglect in keeping them, nor delay in selling them; in case they are impaired, he shall not answer for their first value, but only for what they were worth at the time of the sale. Yet, if the goods be taken out of his possession, he must sue the party taking them, that he may exempt himself from any greater claim, than the damages he shall recover.

In case of an executor's investing money in the funds, and appropriating the same, he shall not be answerable for a loss by the fall of stocks'. Nor,



as it seems, shall he be so liable, although, without the indemnity of a decree, he lend money on a real security, which at the time there was no reason to suspect<sup>a</sup>. An executor has also an honest discretion to call in a debt bearing interest, if he conceive it to be in hazard<sup>b</sup>. If an executor merely give a receipt for so much due on a bond, as he in fact receives, he shall not be charged with a *devastavit* for the residue<sup>c</sup>. Nor is a conversion of the goods of the testator to his own use a *devastavit*, if he pay debts of the testator to the value with his own money<sup>d</sup>. Nor is he so liable if he pay a debt of an inferior nature out of his own purse to the amount of the testator's effects in his hands, for they remain equally liable to the claim of the superior creditor, and may equally be seized at his suit in execution in specie, as the testator's property<sup>e</sup>. Nor, if the executor compound an action of trover for the goods of the testator, and take a bond for the money payable at a future day, does that act necessarily amount to a *devastavit*, as the money, for which the bond is taken, is affixed immediately<sup>f</sup>. But he shall be charged, as we have seen<sup>g</sup>, in case there be a failure in the payment of it. If there be arrears of rent on a lease, and, on the tenant's becoming insolvent, the executor release the arrears, and give him a sum of money to quit possession; in case he appear thus to have acted for the benefit of the estate, he shall be allowed both<sup>h</sup>.

<sup>a</sup> 1 P. Wms. 141.

<sup>b</sup> 2 Fonbl. 2d edit. 186. not. (9). 1 Bro. Ch. Rep. 361. Sed vid. Mosel 98.

<sup>c</sup> Com. Dig. Admon. 1. 2. Off. Ex. 159.

<sup>d</sup> 1 Saund. 307. Vid. Supr. 283.

<sup>e</sup> 1 Saund. 338.

<sup>f</sup> 1 Lev. 189. Supr. 328.

<sup>h</sup> 3 P. Wms. 381.

If

h Cooke's B. L.  
4th Edit. 134.

If an executor become bankrupt, having wasted the assets, the *devastavit* may be proved under the commission<sup>h</sup>.

h Cooke's B. L.  
4th Edit. 134.

h Cooke's B. L.  
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h Cooke's B. L.  
4th Edit. 134.

If the husband of an executrix commit a *devastavit*, in case the executorship commenced before the marriage, they shall both be chargeable. If commenced subsequent to the marriage, the husband is liable alone. If an executrix commit a *devastavit*, and afterwards marry, the husband, who has seen, as well as the wife, is responsible during the coverture<sup>i</sup>. A *devastavit* by one executor shall not charge his companion<sup>k</sup>; and, if there be several administrators, each shall be liable only for what he receives<sup>l</sup>. Formerly, the executor of a testator could not be charged by a *devastavit* committed by the first executor, although to the prejudice of the king, for it was held to be a tort and therefore to die with the party. But, by the stat. 4 & 5 W. & M. c. 24. s. 12. an executor or an executor shall be liable on a *devastavit* committed by his testator, in the same manner as he would have been if living.

i 2 Bro. Ch.  
Rep. 323.

l Off. Ex. 161.  
162. Dyer 210.

3 Bac. Abr. 31.

1 Barnes 440.

1 Barnes 440.

1 Barnes 440.

1 Barnes 440.

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## CHAP. XI.

## REMEDIES FOR, AND AGAINST EXECUTORS, AND ADMINISTRATORS, AT LAW, AND IN EQUITY.

## SECT. I.

*Of remedies for executors and administrators at law.*

**B**EFORE I conclude, it will be necessary to consider first what remedies, either at law, or in equity, executors or administrators are entitled to, in right of the deceased; and then, secondly, what remedies may be had against them.

In regard to the first of these points, the subject has been in a great measure anticipated by the discussion of the executor's interest in the testator's *chofes in action*<sup>a</sup>, the existence of which necessarily supposes a remedy to give it effect.

<sup>a</sup> Vid. *supr.*  
110.

From what has been already stated, it appears that the executor represents the testator in respect to all his personal contracts; therefore, he may maintain such actions to enforce them as might have been maintained by the testator himself<sup>b</sup>. Thus, an executor may have an action on a debt due to the testator by judgment, statute, recognizance, obligation, or other specialty<sup>c</sup>. So he is

entitled

<sup>b</sup> 3 Bac. Abr.  
59, 97. Cro.  
Elis. 377.  
Latch, 167.  
Roll. Abr. 912.  
Off. Ex. 65.  
<sup>c</sup> Com. Dig.  
Admon. B. 13.

c 1 Salk. 314.  
Mod. Ca. 126.  
Ld. Raym.  
971, 1502.  
Vid. 3 Term  
Rep. 685.  
d Fort. 367.  
e 2 Ventr. 249.

f Latch. 168.

g Com. Dig.  
Admon. B. 13.  
Covenant,  
B. 1. 3 Bac.  
Abr. 61.  
h Lev. 26.  
Ventr. 175.  
Off. Ex. 65.

i Off. Ex. 65.  
Com. Dig.  
Wast. c 3.  
j Inst. 305.

k Com. Dig.  
Admon. B. 13.  
l Rac. Abr. 59.  
m 3 Term  
Rep. 660.  
n Al. 1.  
o 1 Nov. 41.  
p Cro. Eliz. 883.

entitled to an action of debt, suggesting a *devastavit* in the life-time of his testator, on a judgment recovered by such testator against an executor. So the executor of the assignee of a bail bond shall have an action upon it<sup>d</sup>. So an executor may maintain an action on a bond, though conditioned for the performance of an award<sup>e</sup>. He may, also, have an action on a covenant entered into with the testator to perform a personal thing<sup>f</sup>; and even on a covenant that touches the realty, as for affuring lands, if it were broken in the testator's life-time, and in such case damages shall be recovered by the executor, although he be not expressly named<sup>g</sup>; for, since the testator was entitled to an action of covenant for such breach, and to recover damages as the principal remedy, and not merely accessory, the law devolves such remedy on the executor; but if waste be committed by the lessee in the life-time of the lessor, after his death, his heir can have no action for the waste, because he cannot recover treble damages: Nor can the executor have it, for he has no right to recover the place wasted, the inheritance of which has descended on the heir<sup>h</sup>.

The executor may, also, in right of the testator, maintain an action on simple contracts, in writing or not in writing, either express or implied<sup>i</sup>, and even on contracts for the benefit of a third person<sup>j</sup>. He may, likewise, have an action for a relief due to the testator<sup>k</sup>. And, pursuant to the stat. 1 Ed. 1. West. 2. c. 23. an executor is entitled to an action



tion of account, on an account with his testa-  
 tor"; but this species of remedy in the courts of  
 law is fallen into disuse. He may, also, by the  
 express provision of the stat. 4 Ed. 3. c. 7. have an  
 action of trespass for the taking of the testator's  
 goods: And, although the statute speak only of  
 the carrying away of goods, yet its operation is  
 not confined to that specific trespass, which is  
 named merely for an example; but it has been  
 held, as we have seen, to comprehend other in-  
 juries to the testator's personal estate: therefore,  
 in this statute, an action will lie for trespass with  
 cattle on his leasehold premises, or for cutting  
 down though growing on his freehold lands, and  
 carrying it away at the same time. So, by the  
 equity of this statute, an executor may main-  
 tain an action of trover, for the conversion of the  
 testator's goods in his life-time; or an action of  
 debt on the stat. 2 & 3 Ed. 6. c. 13. for not setting  
 out tithes due to the testator; or a *quare impedit*,  
 in case he died within six months after the usurpa-  
 tion; and, it seems, that, under this statute, an  
 executor may maintain ejectment for an *ouster* of  
 the testator, although he were seised in fee, be-  
 cause, in such case, the executor may proceed in  
 that form of action for damages only, in the same  
 manner as a lessee where the lease expires pending  
 the suit.

By the common law an executor is entitled to an  
 action of replevin for goods distrained in the tes-  
 tator's life-time; or to an action of detinue for  
 any

m Com. Dig.  
Admon. B. 13.

n Supr. 120.

121.

Com. Dig.  
Admon. B. 13.  
Semab. Latch.  
168.

p Off. Ex. 67, 68

q 1 Ventr. 187.

r Moore 400.

Cro. Elia. 377.

Latch. 168.

1 Anderf. 242.

1 Leon. 193.

194. 1 Ventr.

30.

1 Sid. 88, 407.

4 Mod. 404.

1 Salk. 314.

1 Ventr. 30.

3 Bac. Abr. 91.

in not.

1 Off. Ex. 66,

67, Sav. 94.

Latch. 168.

Noy 87.

Poph. 189.

4 Leon. 15.

u 3 Bac. Abr. 91.

1 Ventr. 30.

3 Term Rep.

13.

w 3 Term Rep.

16. argdo.

Co. Litt. 285,

Stra. 1056.

x 1 Sid. 82,

Latch. 168.

Off. Ex. 66.

Gilb. l. of

Distr. 3d edit.

156.

any specific chattel; or to bring ejectment to recover land held for a term of years; for, in these instances, the thing itself is the object of the action, and the property continues in the plaintiff.

y Latch. 168.  
Off. Ex. 65.

He may, likewise, avow for rent in arrear at the testator's death, as incident to a reversion for years which devolved upon him as executor.

z Com. Dig.  
Distress, A. 2.  
y Roll. Abr.  
671. 1 Salk.  
302, 307.  
z Show. 254.

An executor shall also have an action against the sheriff for the escape of a party in execution on judgment obtained by the testator, even where the escape happened in the testator's life-time. So he may have an action against the sheriff for not returning his writ, and paying money levied on *fiery facias*, or for a false return, stating that he had not levied the debt, when in truth he had.

b Com. Dig.  
Admon. B. 13.  
Cro. Car. 297.  
Dyer 311. Vid.  
1 d. Raym.  
973.

e 1 Roll. Abr.  
913. Cro. Car.  
297.

d 4 Mod. 404.  
y Salk. 12.  
Comh. 327, 323.  
y 1 d. Raym. 40.  
3 Bac. Abr. 98.  
e Stra. 212.

f Latch. 167.

So the executor of a landlord may maintain an action against an officer for removing goods taken in execution before the payment of a year's rent. So, in the character of an executor, he may have a writ of error. And it has been held that he may have such writ to reverse the testator's attainder of high treason, inasmuch as the executor is privy to the judgment, and may be damned by it; but, on the other hand, it has been insisted, that though the reversal restore the blood and land, it is of no avail to the executor, since the goods are forfeited by the conviction, and not by the attainder. An executor is likewise entitled to

g 1 Salk. 295.  
pl. 1. Vid. 4.  
El. Com. 387.

remed

medies by action of disceit, by *audita querela*, or *entlitate nominis*.

Latch. 167.  
Off. Ex. 71.  
3 Bac. Abr. 60.

He may also sue in that character in a court of conscience.

g Dougl. 246.

And by the stat. 11 Geo. 2. c. 19. s. 15. above referred to, an executor of tenant for life, on whose death any lease determined, shall recover of the lessee a just proportion of rent from the last day of payment to the death of such lessor.

h Supr. 161.  
i Com Dig.  
Admon. B. 23.  
Latch. 168,  
169. i Anderf.  
243. Jon. 174.  
k i Ventr. 187.  
Jon. 174. Off.  
Ex. 67, 68.

But an executor has no right to an action for an injury to the person of the testator as for a battery, imprisonment, or the like; nor for a pre-  
judice to his freehold, as for felling his wood, or cutting and carrying away his grafs: for wood and grafs growing are parcel of the freehold<sup>k</sup>, and consequently in such case the heir, and not the executor, is the party injured. Yet if the lord of a manor assesses a fine on a copyhold for his admittance, and die, his executor may bring an action for it; for it does not depend on the inheritance, but is like a fruit fallen.

l 3 Bac. Abr. 93.  
Carrh. 90.  
3 Mod. 239.  
3 Lev. 261.  
Camb. 151.  
Show. 35.  
Ld. Raym.  
502. i Burr.  
1717. accord.  
m Com. Dig.  
Pleader, (2. D.  
1.) 3 Leon. 112.  
n 3 Bac. Abr.  
93. i Roll. Abr.  
603.

The executor may also in right of the testator maintain actions, the cause of which accrued after the testator's death<sup>m</sup>, as in case a bond given to the testator be forfeited after that event<sup>n</sup>; or a personal covenant entered into with the testator be broken<sup>o</sup>; or a debt on any other species of contract made with him, become payable<sup>p</sup>; or his goods

o Off. Ex. 81.  
11 Vin. Abr.  
231. L. of Ni-  
Fr. 158.  
p i Term Rep.  
487. 4 Term  
Rep 565. Com.  
Dig. Pleader,  
(2. D. 1.)  
3 Bac. Abr. 94.  
R. 440.  
5 Co. 31. b.  
Cris. Car 225.  
1 Lev. 250.

be



q 4 Bac. Abr.  
93. in not. 94.  
1 Roll. Abr.  
602. Lane 80.  
6 Mod. 92.

r Com. Dig.  
Admon. B. 13.  
Off. Ex. 70.

s Vid. supr. 106.

t Off. Ex. 36.

w Off. Ex. 36.

x Com. Dig.  
Admon. B. 9.  
1 Salk. 301, 307.  
11 Vin. Abr.  
204. 2 Show.  
254. Vid. supr.  
346.

y 3 Bac. Abr.  
57. Off. Ex. 46.  
Godb. 161.  
Vid. supr. 346.  
y 1 Roll. Rep.  
276. 1 Ed.  
Raym. 35.  
2 Term Rep.  
128.

z Fortes. 370.

a 1 Term Rep.  
487.

b Com. Dig.  
Pleader,  
(2. D. 1.)  
Cro. Car. 685.  
Roll. Abr. 602.  
3 Bac. Abr. 93.

be taken'; or trespass committed on his leasehold premises'; in all these, and the like instances, the executor in his representative capacity entitled to a remedy by action.

So, if the testator died possessed of a term for years in an advowson, it vests, as we have seen in his executor; and, therefore, in case of his being disturbed, he may maintain a *quare impedit*. So, an executor may have an action of replevin for goods taken after the death of the testator. An executor may also avow for rent accrued due after that time, as incident to a reversion for years which vested in him in that character.

If a defendant in execution on a judgment recovered by the testator, escape after the testator's death, the executor shall have an action against the sheriff for the escape\*, as he shall, also, in case the defendant were in execution on a judgment recovered by him as executor.

So, a bail-bond may be assigned to the executor of a deceased plaintiff, and he may bring an action upon it: or a bill of exchange may be indorsed to A. as executor, and he may, in that character, maintain an action on the bill against the acceptor. And, in like manner, an executor may bring an action on any other contract made with him in his representative capacity.



An executor may hold to bail on an affidavit of his belief of the existence of the debt, for the nature of his situation will not admit of his being more positive<sup>b</sup>. Therefore, if an executor swear to the books of the testator, and that he believes them to contain a true account, and the debt to be still unpaid, it shall be sufficient<sup>c</sup>. But, an affidavit by an executor, that the defendant was indebted to his testator in fifty pounds, as appears by the testator's books, was held defective, and common bail ordered<sup>d</sup>.

<sup>b</sup> 1 Term Rep. 716. 3 Bac. Abr. 101.

<sup>c</sup> 1 Crompt. Prac. 40.

<sup>d</sup> 1 Crompt. Prac. 40. Stra. 1219.

It is a general rule, that an executor, when plaintiff, shall pay no costs, for he sues in *auter droit*, and the law does not presume him to be sufficiently cognisant of the nature and foundation of the claims he has to assert<sup>e</sup>. Therefore, if an executor bring an action of trover on a conversion of the testator's life-time, he shall not be liable to costs<sup>f</sup>. Nor shall he be liable, if the trover were in the testator's life time, and the conversion after his death<sup>g</sup>. Nor, shall he pay costs in an action, for a debt due to his testator in his life-time<sup>h</sup>. Nor, in an action for a debt due on a contract made with the testator, which became payable after his death<sup>i</sup>. Nor shall an executor be subject to costs on a writ of error, on a judgment recovered against the testator<sup>k</sup>; for, in all these instances, it is necessary for him to sue in his representative character, and expressly to name himself executor. But, he may bring the action in his private capacity, and, if he fail, he shall be liable to costs; as in an action

<sup>e</sup> 3 Bac. Abr. 100 Cro. Jac. 228 Yelv. 148. 1 Roll. Rep. 62. Carth. 281. 4 Mod. 244. 3 Lev. 375. Skin. 400.

<sup>f</sup> 4 Term Rep. 277.

<sup>g</sup> 4 Term Rep. 281.

<sup>h</sup> 4 Term Rep. 280.

<sup>i</sup> 2 Lord Raym. 1413. Stra. 681. Vid. 4 Term Rep. 278.

<sup>k</sup> 3 Lev. 375. Vid. 4 Term Rep. 280.

13 Bac. Abr.  
100. Savil. 134.  
1 Arch. 220.  
1 Vent. 92.  
Hunt. 78.  
Salk. 314.  
7 Term Rep.  
358. Vid.  
4 Term Rep.  
279.

5 Term Rep.  
234.

2 Vid. 4 Term  
Rep. 280.

6 Term Rep.  
654.

P. H. Bl. Rep.  
566.

93 Bac. Abr.  
100. 11 Mod.  
256. Vid. 4.  
Term Rep. 280.

13 Bac. Abr.  
100. 2 Salk. 596.  
2 Wra. 796.

action for trover and conversion subsequent to the testator's death: Or, if he bring an action for money belonging to the testator's estate, had and received by the defendant, after the death of the testator: Or, if he bring an action on a bond, executed to him by the defendant, for securing a debt due to the testator by simple contract: Or, if he fail by his own mispleading: Or, if he bring a writ of error, where he was liable to costs in the original action: In all these cases the cause of action accrues to him personally; and therefore, like every other plaintiff, he shall be subject to costs. Nor, shall he be exempt, by naming himself executor in an action, when he is under no necessity to do so: otherwise, he might in all cases indiscriminately evade the payment of costs. If, in an action at the suit of an executor, the defendant pay money into court, though he fail to recover a farther sum: it will not be to make the plaintiff liable, but only to lose his costs, in case he proceeds.

Before the stat. 38 Geo. 3. c. 87. an infant under the age of seventeen, was capable of taking of probate, and, therefore, of maintaining an action as executor; but, during his minority, he was obliged to sue by guardian, or *prochein amy*; and could not sue by attorney.

But, as by this statute, probate shall not be granted to him, till he shall have attained the full age of twenty-one years; he cannot, in his representative

representative capacity, sustain an action before that period.

If a married woman be executrix, the husband cannot sue in right of the testator without the wife.

An executor named during the minority of another has the same right to bring actions as an absolute executor.

As executors, in their representation of the testator, make but one person, they must all join in the bringing of actions in his right; although some have omitted to prove the will, or have even refused before the ordinary.

If an infant be co-executor with other persons of full age, he must, I apprehend, join with them in an action, and they shall altogether sue by attorney, or such was the law before the statute, with regard to an infant under the age of seventeen.

If A. and B. be appointed executors, and A. refuse to join in such action, B. may commence the action in the name of them both; and, then, in summoning A. there shall be judgment of non-averance; that is to say, that B. shall sue alone: and, on A.'s default on the summons, there shall be the same judgment; and B. then may proceed in the action, and recover in his own name only: otherwise, a co-executor, by collusion with the

A a debtor,

r Com Dig.  
Admon. D.  
Off. Ex. 207.  
208.

s Com. Dig.  
Admon. F.  
Semb. Off. Ex.  
215, 216.

t 3 Bac. Abr. 32.  
Off. Ex. 95, 100.  
Godolph. 134.  
u Off. Ex. 42.  
Com. Dig.  
Abatement.  
E. 13. Pleader,  
(2 D. 1.) 9 Co.  
37. 1 Lev. 161.  
Vid. supr. 21.  
23.  
w 3 Bac. Abr.  
618. 1 Roll.  
Abr. 188.  
Cro. Eliz. 278.  
2 Saund. 212.  
213. 1 Ventr.  
102, 1 Sid. 449.  
Carth. 114.



x3 Bac. Abr. 33.

Cro. Car. 410.

2 Roll. Abr. 98.

Off. Ex. 98, 99.

y Cro. Eliz. 651.

Co Litt. 139.

2 Off. Ex. 105,  
106.

debtor, might prevent his being sued for the debt. If  
By the death of the party severed, the writ shall  
not abate<sup>y</sup>. Nor, if he live till judgment, can he  
sue out execution, because the recovery is in the  
name of the other executor alone<sup>z</sup>.

If a judgment be recovered by two executors, and the one prays a *capias*, and the other a *facias*; it has been said, the *capias* shall be awarded as most beneficial for the estate<sup>a</sup>.

a 3 Bac. Abr. 33.

in not Hob.

61. Vid.

1 Atk. 460.

By stat. 25 E. 3. c. 5. the executor of an executor is put on the same footing, in regard to the bringing of actions, as an immediate executor<sup>b</sup>.

b Vid. Off. Ex.

257. Godb.

262.

An executor, *de son tort*, is not entitled to bring any action in right of the deceased. As he comes in by wrong, he is liable to all the trouble of an executorship, without any of its privileges<sup>c</sup>.

c 2 Bl. Com.

507. 2 P. Wms.

583. vid. supr.

287.

An administrator may, in right of his intestate, maintain actions in the same manner, as an executor in right of his testator<sup>d</sup>.

d Com. Dig.

Admon. B. 13.

Off. Ex. 259.

All special and limited administrators likewise may maintain actions in right of their respective intestates. And, indeed, the principle, on which the ordinary has the power of granting such administrations, is, that there may be a person capable of recovering property belonging to the estate<sup>e</sup>.

e 2 P. Wms.

576. 6 Co. 67.

b.



If an administrator *durante minoritate* bring an action and recover, and then his administration determine by the executor's coming of age, such executor may have a *scire facias* on the judgment.

f 3 Bac. Abr. 18.  
1 Roll Abr.  
888, 889.  
Cro. Car. 127.  
1 Lev. 181.  
1 Vern. 25.

So, if such administrator obtain judgment, he may bring a *scire facias* against the bail, nor can they object that the executor has attained the age of twenty-one; for the recognizance is to the administrator himself by name<sup>e</sup>. But, it seems to be a question, whether in such case, he or the executor shall sue out execution on the judgment<sup>h</sup>.

g 3 Bac. Abr. 18.  
2 Lev. 37.  
h 2 Lev. 37.

If there be several administrators, they must, like co-executors, all join in an action<sup>i</sup>.

i Com. Dig.  
Abatement,  
E. 14 Pleader,  
(2 D. 10)

If a judgment, after verdict, be recovered by an executor or administrator, in such case an administrator *de banis non*, is by stat. 17 Car. 2. c. 8. entitled to sue a *scire facias*, and take out execution on such judgment.

In case a party died seised of a rent service, rent charge, rent seck, or fee farm, in fee-simple, fee-tail, *pur auter vie* in the life-time of *cestui que vie*, the common law afforded no remedy to recover the arrears due at the time when the owner of such rents died. It was therefore enacted by the stat.

H. 8. c. 37.<sup>k</sup>, that the executors and administrators of tenants in fee, fee-tail, or for life, of such rents, may have an action of debt for all such

k Vid. 3 Bac.  
Abr. 91. 2 Bac.  
Abr. 282 in  
not. 4 Burn.  
Eccl. 1. 262.

A 2 2

arrears,

arrears, or may distrain for the same upon the lands chargeable, so long as they remain in the possession of the tenant, who ought to have paid the rents; or of any other person, claiming under him by purchase, gift, or descent. The statute also provides, that a tenant *pur auter vie*, his executors and administrators may, after the death of *cestui que vie*, have an action of debt, or may distrain for such arrears incurred in the lifetime of *cestui que vie*.

Before the passing of this act, the inconvenience did not exist to the same extent, in regard to the executor of tenant for his own life, or to the executor of tenant *pur auter vie*, after the death of *cestui que vie*: for by the common law, an executor in either of those cases, had a remedy, by action of debt, for the arrears of rent which had accrued in the lifetime of the testator<sup>1</sup>; but, it has been adjudged, that the statute being remedial, applies to the executors of all tenants for life; not merely such executors, as, previously to the statute, had a remedy whatever, but also to those who were entitled to an action of debt, to whom, therefore, it gives merely the additional remedy of distress. Yet, although the executors of all tenants for life, are authorised by the statute to distrain for such arrears<sup>2</sup>, it seems, that rent reserved on a lease for years, is not without its provisions, inasmuch as the landlord is not tenant in fee, fee tail, or for life, under such a rent; and the executors of such tenants only are mentioned in the act<sup>3</sup>. However, in trespass

<sup>1</sup> Hargr. Co. Litt. 167. not. 4. Gilb. L. of Distress, 3d edit. 33.

<sup>2</sup> Hargr. Co. Co. Litt. 162. b. not. 1. Ld. Raym. 172. Cro. Eliz. 332. L. of Ni. Pr. 5th edit. 56. Gilb. L. of Distress, 3d edit. 33. Sed vid. Cro. Car. 471.

<sup>3</sup> Ld. Raym. 172.

<sup>4</sup> L. of Ni. Pr. 5th edit. 57. Gilb. L. of Distress, 3d edit. 34.

where it appeared the defendant had distrained the plaintiff's goods, for rent due to his testator in a lease for years, Lee, C. J. held it to be comprehended by the statute, and the defendant obtained a verdict<sup>p</sup>.

<sup>p</sup> Powel v. Killick, at Westminster, M. 25 Geo. 3.

Nor does the statute extend to the executor of the grantee of a rent-charge for a term of years, if so long live<sup>q</sup>: Nor to copyhold rents, but only to rents out of free land<sup>r</sup>.

<sup>q</sup> L. of Ni. Pr. 5th edit. 57.

<sup>r</sup> 2 Bac. Abr. 281. in not.

Yelv. 135. Sed. vid. Carth. 91.

But, the executor of an executor, is held to be within the equity of this statute<sup>s</sup>.

<sup>s</sup> Off. Ex. 158.

An executor may also prove a debt due to the testator under a commission of bankruptcy<sup>t</sup>.

<sup>t</sup> 2 Bro. Ch. Rep. 619.

In case a commission has been superseded, the executors of the party, against whom it issued, may take out a commission for a debt due to him; but, if it has not been superseded, they have no such right; for the debt having vested in his assignees, the executors are incapable of being the petitioning creditors<sup>u</sup>.

<sup>u</sup> 1 Atk. 100.

Executors, in their respective character, may sign a bankrupt's certificate<sup>w</sup>. And, even where the bankrupt's father being principal creditor, chose himself sole assignee, and dying intestate, the bankrupt, as his representative, chose himself assignee, and signed his own certificate, it was held regular<sup>x</sup>.

<sup>w</sup> Cooke's B. L. 4th edit. 497.  
<sup>x</sup> 1 Atk. 85.

<sup>x</sup> Cooke's B. L. 4th edit. 498.

But, Green 260.



y 1 Atk. 85.

But, an executor, who has also a claim in his own right, cannot sign in both capacities <sup>r</sup>.

z Cooke's B. L.  
4th edit. 533.  
1 Atk. 208, 209.  
3 Atk. 814.

If the bankrupt's estate pay a clear dividend of ten shillings in the pound, his representatives are entitled to the allowance <sup>z</sup>.

a Cooke's B. L.  
4th edit. 67.  
1 Atk. 102.

If the executor of a trader only dispose of the stock in trade, it will not make him a trader, or subject to a commission of bankruptcy. Thus where the executor of a wine-cooper found it necessary to buy wines to refine the stock left by the testator, this was held not to constitute him a trader <sup>a</sup>. But, in case the testator direct the residue of his estate to be employed in carrying on his trade, such residue shall be liable to all the debts of the trade. And, it seems, that in case the executor shall thus carry it on, he may be a bankrupt, although his name do not appear, and will be personally responsible for the debts <sup>b</sup>.

b Cooke's B. L.  
4th edit. 67.  
in not.

## S E C T. II.

### *Of remedies for executors and administrators in equity*

a Vid. Com.  
Dig. Chancery,  
(2 B. 1.)  
(3 C. 1.)

AN executor or administrator is also entitled to all the equitable interests of the deceased, and may, in his representative capacity, enforce them in a court of equity <sup>a</sup>.

Such



Such interest, vested in the testator, shall vest in the executor, although he be not named; as if a legacy be given to A. and, if he die under age, to B. and C. or the survivor of them; and, if first, B. die, then C., and, lastly, A. die under age; the legacy shall be decreed to the executor of C. who survived B.<sup>b</sup>

<sup>b</sup> Com. Dig. Chancery, 3 G.  
<sup>2</sup> Ventr. 347.

Partners in trade are joint tenants in the whole stock and effects, not merely in that particular stock in being at the time of entering the partnership, but continue so through all its changes. And, therefore, in case of the death of one partner, the whole property at law vests in the survivor. But, in equity, such survivor is considered merely as a trustee for the representatives of the deceased, to the extent of his share; on which they have a specific lien, although the survivor should afterwards die, or become bankrupt.<sup>c</sup>

<sup>c</sup> 1 Ves. 242.

If, pending a suit, the plaintiff die, his executor may continue it by bill of revivor, and have the full benefit of the proceedings.<sup>d</sup>

<sup>d</sup> Mitf. 63, 64.

If the executor find the affairs of the testator so complicated, as to render the administering of the estate unsafe, he may institute a suit against the creditors, for the purpose of having their several claims adjusted by the decree of the court.<sup>e</sup> But such bill will not entitle him to an injunction to restrain any creditor from proceeding against him at law: for that purpose, it is necessary, that there be

<sup>e</sup> Com. Dig. Chancery.  
<sup>3</sup> G. 6.  
<sup>2</sup> Fonbl.  
2d edit. 408.  
not (t)  
<sup>2</sup> Vern. 37.

be

be a suit or decree, by and on behalf of the creditors of the testator <sup>f</sup>.

<sup>g</sup> Prac. Reg. in Chan. 2d edit. 209.

<sup>h</sup> Prac. Reg. in Chancery, 2d edit 209. Vid. 11 Vin. Abr. 363 365. 3 Bac. Abr. 32.

<sup>i</sup> Hinde's Prac. in Chan. 47.

If two executors are plaintiffs in equity, and one of them is excommunicated, the other may be served, and the defendant shall answer him <sup>k</sup>. One executor may sue his co-executors in equity <sup>l</sup>. In case of a suit by co-executors, the proceedings do not abate by the death of one of them <sup>l</sup>.

If a temporary executor prove the will, and afterwards his executorship determine, the subsequent executor may maintain a suit without another probate <sup>k</sup>.

<sup>k</sup> Prac. Reg. 2d edit 209. 1 Chan. Ca. 265.

An administrator shall be relieved in chancery against a fraud to his administration. As if the grant be wrongfully obtained, and afterwards repealed on citation, an assignment of a term by the grantee in trust for himself, shall be revoked and avoided by the subsequent administrator <sup>l</sup>.

<sup>l</sup> Ch. Ca. 129. Com. Dig. Chancery, (2 B. 1.)

If a bill be brought by an administrator *durante minoritate*, and, pending the suit, the executor come of age, he may continue the suit by a supplemental bill <sup>m</sup>.

<sup>m</sup> Mitf. 61.

In case an administration be determined by death, a bill of revivor, by a subsequent administrator, has been admitted <sup>n</sup>.

<sup>n</sup> Mitf. 61. in not. 1 Vern. 237. 2 Eq. Ca. Abr. 342.

S E C T. III.

*Of remedies at law against executors and administrators.*

I AM now, in the last place, to treat of the remedies against executors and administrators, or the means which the law prescribes to enforce the performance of their various duties.

As representatives of the deceased they are answerable, whether expressly named or not, as far as they have assets for all his debts, covenants, and other contracts<sup>a</sup>. An executor is thus liable for all debts due from the testator by judgment, statute, recognizance, obligation, or other debts of record or specialty<sup>b</sup>.

<sup>a</sup> 3 Bac. Abr. 93.  
Off. Ex. 117.  
118. Cro. Com.  
187. Jon. 223.  
Yelv. 103.

<sup>b</sup> Com. Dig.  
Admon. B. 14.  
Off. Ex. 118.

So, an action of debt lies against the executor or sheriff, on a judgment recovered against the testator, for an escape<sup>c</sup>.

<sup>c</sup> Dyer 311.

So, an action may be maintained against an executor on other inferior debts of record, as issues forfeited, fines imposed at the assizes, quarter sessions, by commissioners of sewers, or bankrupts, or stewards in leets, or the like<sup>d</sup>.

<sup>d</sup> Com. Dig.  
Admon. B. 14.  
Off. Ex. 118.

He

e Salk. 297.

Sei 387, 406.

Com. Dig.

Covenant, C. 1.

I Carth. 519.

Salk. 309.

Id. Raym. 553.

g Com. Dig.

Admon. B. 14.

Noy 43, 44.

h Com. Dig.

Admon. B. 14.

59 Co. 89. b.

30 Co. 77. b.

Cro. Car. 294.

Plowd. 182.

k 9 Co. 87. b.

l Com. Dig.

Admon. B. 14.

1 Roll Abr 921.

Jon. 530.

Mar. 13.

m Com. Dig.

Admon. B. 4.

1 Roll. Rep. 14.

Cro. Jac. 404.

3 Bul. 2, 6.

Sti. 158.

Ow. 56, 57.

Falm. 329.

Jon. 16.

n Com. Dig.

Admon. B. 15.

Off. 127.

128. Hainbly

v Trott,

Cowp. 375.

He is, also, subject to an action on the testator's obligation; or on his covenant, as to pay rent<sup>e</sup>, or to repair premises<sup>f</sup>. An executor may, likewise, be sued by the lord of the manor for a relief due from the testator<sup>g</sup>. So, an action lies against an executor on simple contracts of the testator, either in writing or by parol, either express or implied, as on bills of exchange and promissory notes, debt for rent on a parol lease<sup>h</sup>, or *assumpsit* for money had and received by the testator to the plaintiff's use<sup>i</sup>. So, an action may be maintained by a gaoler against an executor for provisions found for the testator in prison<sup>k</sup>: Or against the executor of a sheriff, who levied money on a *feri facias*, and died before he paid it<sup>l</sup>: Or, as it seems, against an executor on a collateral promise by the testator<sup>m</sup>, as, where he promised to give A. a sum of money in consideration that he would marry B.

In short, in all cases where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by the work and labour or property of another, or a promise of the testator, express or implied, the action survives against the executor. But, where the cause of action is a *tort*, or arises *ex delicto*, supposed to be by force and against the king's peace, there the action dies, as, battery, false imprisonment, trespass, slander, nuisance, diverting a watercourse, escape, or on a penal statute; and many other cases of the like kind<sup>n</sup>.

Such



Such are the species of actions which survive against an executor, or die with the person, on account of the *cause* of action. But there are other species of actions which survive, or die in respect of the *form*.

In some actions the defendant could have waged his law as in debt on a simple contract, and, therefore, no action in that form lies against an executor; but now other actions are substituted in their room, on the very same cause, which survive, and may be maintained against him.

No action, where in form the declaration must be *quare vi et armis, et contra pacem*, or where the plea must be, that the testator was not guilty, will lie against an executor.

On the face of the record the cause of action arises *ex delicto*, and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender.

But in most, if not in all the cases, another action may be brought, which will answer the purpose. An action, on the custom of the realm, against a common carrier, is for a *tort* and supposed crime, the plea is not guilty, and, therefore, an action will not lie against an executor; but *assumpsit*, which is another action for the same cause, is maintainable. So, if a man take a horse from another, and bring him back again, an action of trespass

• Cowp. 375.

• Cowp. 376.

trespass will not lie against the executor, though it would have lain against the party himself. But an action for the use and hire of the horse will lie against the executor<sup>o</sup>. Nor is the executor chargeable for the injury done by his testator in cutting down another man's trees; but, for the benefit arising to his testator from the value or sale of the trees, he may be called upon to answer<sup>p</sup>. Nor will trover lie against an executor for a conversion by his testator; for in that case the form of the plea is, that the testator was not guilty, and the issue is to try the guilt of the testator: But if the testator sold the property in his life-time, his executor shall be charged in an action for money had and received by the testator to the plaintiff's use.

• Cowp. 376,  
377.

The fundamental distinction then, is this: If it is a sort of injury, by which the offender acquires no gain to himself at the expence of the sufferer; as, for example, beating or imprisoning a man, there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury, and, therefore, the executor is not liable: But, where, besides the crime, property is acquired which benefits the testator, there, an action for the value of the property shall survive against the representative<sup>o</sup>.

• Corn Dig.  
Plunder, (2. D.  
2.)

The executor is also liable on contracts of the testator, although the cause of action accrue not till after his death; as on a bond which becomes due, or a note payable, subsequent to that event<sup>r</sup>.

The

The liability of an executor to the payment of rent incurred after the testator's death, has been already considered \*.

\* Vid. *supra*.  
218, et seq.

In the cases which I have been enumerating the executor shall be liable only to the amount of the assets \*. But there are cases in which he shall be personally responsible *de bonis propriis*; as if he commit any of those acts which constitute a *devastavit*, on its being duly substantiated, he must answer out of his own estate for the value of what he has wasted \*. An executor may also make himself chargeable in his private capacity to a plaintiff's demand, by pleading a plea, the falsehood of which lies in his own knowledge, and which, if true, would be a perpetual bar to the action \*.

9 Co. 22. b.

u Com. Dig.  
Admon. 1. 3.  
3 Bac. Abr. 77.  
Off. Ex. 157.  
164.

w Off. Ex. 185.  
3 Bac. Abr. 89.  
1 Roll. Abr.  
930. Godolph.  
198 11 Vin.  
Abr. 383.  
1 Bl. Rep. 400.  
x 1 Roll. Abr.  
930, 933.  
y Cro. Jac. 671.  
672.

Therefore, if an executor plead *ne unques executor* that he never was executor<sup>x</sup>, or plead a release made to himself<sup>y</sup>, and it is found against him, the judgment shall be in the alternative *de bonis testatoris et si non de bonis propriis*. An executor may also make himself personally liable by his promise to pay a debt of the testator, or answer damages out of his own estate; but pursuant to the statute of frauds such promise must be by some note or memorandum in writing, signed by him, or some other person by his authority<sup>z</sup>: There must also be a sufficient consideration to support the promise: It must be alleged, and proved, that assets were come to his hands; or that, in consideration the creditor would forbear to sue him, he promised to pay the debt<sup>a</sup>: Or an admission of assets must be implied from

z Vid. *Comp.*  
289.

a Cro. Eliz. 91.  
1 Ves. 125.  
cited *Comp.*  
193.



b Camden v.  
Turner, cited  
Cowp. 293.

c 3 Enc. Abr. 90.  
1 Sid. 89.  
1 Lev. 71.  
1 Roll. Rep. 27.

from the nature of the promise itself, as where the defendant owned the money lay ready for the plaintiff whenever he would call for it<sup>b</sup>: In all these cases the executor shall be liable to the same species of judgment. Forbearance to sue, although the remedy be only in equity, is a sufficient consideration<sup>c</sup>.

But, in case there be no assets, a promise by an executor to pay a debt of the testator is *nudum pactum*<sup>d</sup>.

d 5 Term Rep.  
8.

e 5 Term Rep.  
8.

f 5 Term Rep.  
6.

Nor shall an executor's paying interest on a bond due from the testator be considered as an admission of assets for the principal<sup>e</sup>. Nor shall an executor's merely submitting to an award amount to an admission of assets<sup>f</sup>. But if the executor bind himself by a personal engagement to perform the award, or if his submission to arbitration be a reference not only of the cause of action, but also of the question, whether he has or has not, assets, and the arbitrator award the executor to pay the amount of the plaintiff's demand, it is equivalent to determining as between the parties, that the executor had assets to pay the debt. The defendant therefore is concluded by the award, although it will not operate as an admission of assets in any other litigation; and he may be attached for non-payment<sup>g</sup>.

g 1 Term Rep.  
691. 5 Term  
Rep. 7. 7 Term  
Rep. 453.

According to a modern decision an action may be maintained in a court of common law against an executor



executor in that character on his express promise to pay a legacy in consideration of assets<sup>h</sup>. And, in another case, it was also ruled, that on the same promise, grounded on the same consideration, an action will lie against an executor personally in his own right<sup>i</sup>.

<sup>h</sup> Atkins v. Hill, Cowp. 184.

<sup>i</sup> Hawkes v. Saunders, Cowp. 229.

But this doctrine has been very much shaken by a subsequent adjudication. It is true, that in the case on which it was founded the executor had not, as in the two former instances, *expressly* promised to pay the legacy; yet two of the three learned judges, who decided it, reasoned on general principles, and denied the jurisdiction of the courts of common law over the subject of legacy, without reference to any distinction between an express and an implied promise. They held, that policy and convenience forbade the courts of common law to entertain this species of action, since they can impose no terms on the party suing; whereas courts of equity in such suits interfere in a manner highly beneficial to private families; as on a bequest of a legacy to the wife they require the husband to make an adequate settlement on her, as the condition of his recovering it<sup>k</sup>: But, if he might resort to an action, the wife and children would, in a variety of instances, be left destitute of all provision. They also observed, that the only other precedent of such an action occurred in the time of the usurpation; and the reason there assigned for allowing it, was to prevent a failure of justice, as the ecclesiastical courts were at that time abolished, and the court

<sup>k</sup> VII. 3 P. Wms. 102, & *supra* 151.

1 Deeks v.  
Strutt, 5 Term  
Rep. 690. Vid.  
also Farish v.  
Wilson,  
Peake's Ni. Pr.  
Rep. 73. See  
4 Bac. Abr.  
446. in not.  
m Supr. 347.

n Dougl 263.

court of chancery did not take cognizance of legal  
tort matters. Although an executor be entitled, as we have  
seen, to sue in a court of conscience, he is not  
liable to be sued there. The legislature could not  
intend to give to such a court an authority to en-  
quire into the conduct of executors, and to take  
an account of assets.

o 3 Bac. Abr.  
101. Cro. Jac.  
350. Yelv. 53.  
Cro. Car. 59.  
Litt. Rep. 2.  
1 Crompt.  
Prac. 29.  
p 1 Crompt.  
Prac. 29.  
1 Lev. 39.  
Carth. 264.  
1 Mod 16.

q 3 Bac. Abr.  
101. 1 Crompt.  
Prac. 101.

r 3 Bac. Abr.  
101. Comb.  
206. 1 Sid. 63.

s Mackenzie  
v. Mackenzie,  
1 Term Rep.  
716.

t 3 Bac. Abr.  
100. Plowd.  
183. Hardr.  
165. Cro. Eliz.  
503. Hutt. 69.

u 3 Bac. Abr.  
100.

Executors and administrators shall not in general  
be held to bail, for they are not personally liable  
but only in respect of the assets. It were unreason-  
able to subject them to an arrest in their representa-  
tive capacity. But they may be held to bail, if  
it appear that they have wasted the property.  
Yet a bare suggestion of a *devastavit* is not suffi-  
cient for that purpose without the oath of the  
plaintiff. So where on a judgment against an  
executor execution is sued out, and the sheriff re-  
turns a *devastavit*, in an action of debt on the  
judgment the executor may be required to put in  
special bail. Where an executor has personally  
promised to pay a debt, it seems he may be held  
to bail on such promise.

An executor defendant shall pay costs in all cases  
in which the plaintiff prevails. And the judgment  
for the costs is *de bonis testatoris si, et si non, de bonis  
propriis*. An executor defendant shall have costs  
in case of a judgment in his favour.

Before

Before the stat. 38 Geo. 3. c. 87. an infant executor, after he had attained the age of seventeen, might have been sued, in which case he was to appear by guardian, and not by attorney, when the same judgment might have been recovered against him as against any other executor<sup>w</sup>; but in consequence of that act, till he comes of age he is neither capable of suing, nor liable to be sued.

<sup>w</sup> 3 Bac. Abr. 9, 612. 1 Roll. Abr. 287, 288. Poph. 130. Cro. Jac. 430. 1 Roll. Rep. 380.

A limited executor is also subject to be sued during the continuance of his office<sup>x</sup>.

<sup>x</sup> Vid. Off. Ex. 215, 216.

In an action against a married woman executrix the husband must be joined<sup>y</sup>. On a judgment against husband, and wife executrix, if she survive, an action of debt does not lie suggesting a *devastavit* by the husband; for although, in case she married after the testator's death, she is answerable for the wasting by the husband<sup>z</sup>, yet she shall not be charged *de bonis propriis* for the costs recovered against him<sup>a</sup>.

<sup>y</sup> Com. Dig. Admon. D. Off. Ex. 203, 207. 3 Bac. Abr. 9.

<sup>z</sup> Vid. *supr.* 287.

<sup>a</sup> Com. Dig. Admon. (I. 3.) 2 Lev. 161.

If there be several executors, they must be all sued<sup>b</sup>, in case they have all administered. But such as have not administered may be omitted<sup>c</sup>: for although executors themselves must be conscious how many are named by the will, and must, as we have seen, frame their action accordingly; yet creditors and strangers are bound to take notice of such executors only, as in fact execute the office. If one only confess a judgment, it seems now settled that it shall not bind nor conclude

<sup>b</sup> 3 Bac. Abr. 32. Off. Ex. 95.

<sup>c</sup> 3 Bac. Abr. 32. 1 Lev. 161. 1 Sid. 242.



d Off. Ex. 98.  
Vid. *supr.* 182.

d Off. Ex. 98.  
3 Bac. Abr. 33.  
Godolph. 176.  
1 Atk. 460. &  
vid. *supr.* 282.

3 Bac. Abr. 13.  
619. Yelv. 130.  
Styl. 318. vid.  
3 Mod. 236.  
2 Str. 784.

f 3 Bac. Abr. 31.  
Off. Ex. 162.  
162. Godolph.  
134

g Cro. Eliz. 318.

h Vid. Com.  
Dig. Admon.  
(1. 3.)

3 Bac. Abr. 99.  
Off. Ex. 259.  
3 Mod. 113.  
2 Bro. Ch. Rep.  
324. Vid. *supr.*  
342.

i *Supr.* 343.  
344.

k Salk 314.  
Ld. Raym. 971.

the rest'. If they plead distinct pleas, it is said, that shall be received which is best for the estate, or most decisive of the question'. Of co-executors, if some are of full age, and others infants, the action may be against them all; but the latter cannot appear with the others by attorney, but must appear by guardian'.

It is clearly settled, that one executor shall not be charged with the *devastavit* of his companion, and shall be liable only to the extent of the assets, which come to his hands'. The testator's having misplaced his confidence in one executor shall not operate to the prejudice of the others'.

An executor of an executor shall, as I have already mentioned, pursuant to the stat. 4 & 5 W. & M. c. 24. s. 12. be charged on a *devastavit* committed by his testator in the same manner as such testator would have been if living'. But although, as we have seen', an action of debt may be maintained by A. an executor, suggesting a *devastavit* in the life-time of his testator on a judgment, recovered by such testator against B. also an executor; yet in such case it seems as against B.'s executor, a *scire facias* is requisite, inasmuch as he was not privy to the judgment'.

An executor *de son tort* is liable to the action of the lawful executor or administrator, or to that of a creditor; and, in the latter case, may be charged



as executor generally. If there be also a lawful executor, they may be joined in an action by a creditor, or sued severally; but, it is otherwise, if there be a lawful administrator, he cannot be so joined with an executor *de son tort*. If a creditor take out administration, he may recover his debt against him, who, before the grant, was executor *de son tort*, as well as the goods of the intestate, taken or converted previously to the same.

Com. Dig. Admor. C. 1. Carth. 104. Off. Ex. 177. 3 Co. 31. m Off. Ex. 178. n Off. Ex. 178.

o Com. Dig. Admor. C. 3. Sti. 384.

A party, as we have seen, may be an executor *de son tort* of a term, and is chargeable for waste committed by him on the demised premises. If an executor *de son tort* be guilty of that, or any other species of *devastavit*, or plead *ne unques executor*, and it be found against him, he shall be charged as another executor *de bonis propriis*: but, in general cases, he is liable only to the amount of the assets which come to his hands.

p Supr. 19.

q 3 Lev. 35. Off. Ex. Suppl. 102.

r Off. Ex. 137.

s Dyer 166. b. not. 11.

By the Stat. 30 Car. 2. c. 7. made perpetual by the Stat. 4 & 5 W. & M. c. 24. above referred to, the executor of an executor, in his own wrong, is chargeable on a *devastavit* by his testator, in the same manner as such testator would have been, if living.

t Vid. Com. Dig. Admon. I. 3.

But, it seems, that an executor *de son tort* of an executor *de son tort*, is not liable for a *devastavit* committed by such first executor, either at common law, or by either of the two last mentioned statutes.

u Com. Dig. Admon. I. 3. Andr. 252. 3 Bac. Abr. 100. in not.

What has been stated in regard to actions against executors, is, in the main, applicable to administrators, whether general, or limited. If an administrator *durante minoritate* continue in the possession of the effects after the executor is come of age, he may be sued either by the executor, or by a creditor<sup>c</sup>. But, if such administrator administer in part, and deliver to the executor, on his coming of age, all the residue, he cannot be charged by a stranger<sup>d</sup>. If, before the executor attain the age of twenty-one, the administrator wasted the assets, he may be charged on the special matter by the executor<sup>e</sup>; but, subsequent to that period, he is not liable for the *devastavit* at the suit of a creditor. The creditor must resort against the executor, who is entitled to his remedy against the administrator<sup>f</sup>.

By the stat. 8 *Ann. c. 14.*<sup>g</sup>, a lessor is empowered to distrain, within six calendar months after a lease for life, or for years, or at will, is determined, provided his own title or interest, as well as the tenant's possession, continue at the time of the distress.

In case a lessee die before the expiration of a term, and his executor continue in possession during the remainder and after the expiration of it, a distress may be taken for rent due for the whole term<sup>h</sup>.

<sup>c</sup> Com. Dig. Admon. F.  
<sup>i</sup> Sid. 57.  
<sup>i</sup> Anders. 34.

<sup>d</sup> 1 Mod. 174.  
175.

<sup>e</sup> Latch. 160.

<sup>f</sup> 3 Bac. Abr. 14.  
Latch. 267.  
<sup>i</sup> Anders. 34.  
6 Co. 18. b.

<sup>g</sup> Vid. Com. Dig. Distress, A. 2. 3 Bl. Com. 11.

<sup>h</sup> Braithwaite v. Cooksey & al. 1 H. Bl. Rep. 465.

If an executor become bankrupt, his bankruptcy does not divest him of his legal right of executorship, nor does the commissioners assignment affect the assets, except in regard to such beneficial interest, as the bankrupt himself may be entitled to. But, although a bankrupt executor may strictly be the proper hand to receive the assets, yet, if his assignees be possessed of any part of the property, the court of chancery will, for the benefit of creditors and legatees, appoint a receiver for the same; or will direct the bankrupt himself to be admitted a creditor for what he shall be indebted to the estate; nor is this practice incongruous, as he acts in *auter droit*: But, to prevent embezzlement, the court, on such proof, will order the dividends to be paid into the bank, subject to the demands on the testator's estate<sup>1</sup>. So, where A. a bankrupt, and also B. claimed to be executors of a creditor of A. and a suit was pending in the ecclesiastical court, in regard to the executorship; the Lord Chancellor permitted B. to prove the debt under the commission, and directed the dividends to be paid into the bank, to abide the event of the litigation<sup>2</sup>.

1 Cooks's B. L.  
113, 134, 135.  
137. Stone 131.  
1 Atk. 101.  
2 P. Wms. 346.  
2 Bro. Ch. Rep.  
596. Vid. also  
supr. 342.

2 3 Bro. Ch.  
Rep. 198.



## S E C T. IV.

*Of remedies against executors, and administrators in equity.*

An executor or administrator is also, in his representative character, liable to all equitable demands with regard to personal property, that existed against the deceased at the time of his death.

If, pending a suit, the defendant die, it shall be continued by bill of revivor against his executor.<sup>a</sup>

Legatees, or persons in distribution, are also entitled to assert in a court of equity, their claims against the executor or administrator, on the principle, that equity considers an executor as a trustee for the legatee, in respect to his legacy, and as trustee in certain cases for the next of kin of the undisposed surplus<sup>b</sup>. It also regards the administrator as trustee for the parties in distribution. And trusts are the peculiar objects of equitable cognisance. Thus a bill lies for a personal legacy; or for a discovery, and an account of assets; or for the distribution of an intestate's personal estate<sup>c</sup>. So it lies for the discovery of assets, merely for the purpose of enabling the plaintiff to maintain an action at law against an executor<sup>d</sup>, but not till he has denied assets by his plea to the action<sup>e</sup>.

<sup>a</sup> 4 Bac. Abr.

447. 1 Atk. 491.

1 P. Wms. 544.

575. Prac. Reg.

2d edit. 209.

<sup>c</sup> 2 Fonbl. 322.

1 Vern. 138.

134. 2 Ch. Ca.

95. 2 Ventr.

362. 2 Ch. Rep.

167.

<sup>d</sup> 2 Fonbl. 321.

not. (d). ibid.

322. Com. Dig.

Chancery,

(3 D. L.)

<sup>e</sup> Com. Dig.

Chancery,

(2 G. 3.)

<sup>f</sup> Ibid. (3 B. 2)



An executor may be also called upon in equity, to account for interest he has made of the testator's estate.

211 Vin. Abr.  
433. in 991.

And, although the rule be not invariable, that an executor, in all cases, shall pay interest for money employed in the course of his trade; yet if, without any reasonable cause, he detain it for any length of time from the persons entitled, and apply it to the purposes of his trade, or even suffer it to lie idle in his hands, he shall be subject to the payment of interest. And if a will direct the executor to lend, at the best interest, a sum of money, which, at the time of the testator's death, is outstanding at four *per cent.*, and the executor suffer it to continue so, he shall be personally liable to pay five. Nor, if an executor compound debts due from the testator, or buy them in for less than their amount, shall he be personally entitled to the benefit of the composition: but other creditors, or the legatees, or the party entitled to the surplus, shall have the advantage of it.

17 Bro. Ch.  
Rep. 359.  
1 Ves. jun. 294.

2 Bro. Ch.  
Rep. 429.

11 Vin. Abr.  
433. 1 Salk.  
155. pl. 4.

Yet, if an executor lend money on real security, which at that time there was reason to suspect, and afterwards such security prove bad, he shall not be accountable for the loss, any more than he would have been entitled to the produce of it, if it had been sufficient. So, where A., an executor, paid the assets into the hands of B., his co-executor, with whom the testator was used to keep cash as his banker, on the failure of B. the court held,

2 P. Wms.  
141. 4 Barn  
Ecc. L. 498.  
Supr. 340, 341.

y 4 Burn Eccl.  
L. 428.  
1 P. Wms. 243.

held, that A. ought not to suffer for having trusted him, whom the testator trusted in his life-time, and at his death appointed one of his executors.

z 11 Vin. Abr.  
438. 3 P. Wms.  
387. Vid. *supr.*  
341.

So, although, generally speaking, if an executor compound or release a debt due to the testator, he shall answer for the amount, still, if he appear to have acted for the benefit of the estate, he shall not be charged<sup>2</sup>.

a 3 P. Wms.  
336. 1 Vin.  
Abr. 426, 427.  
428, 432.  
3 Bac. Abr. 8.  
1 Ask. 101.  
b 2 Vern. 259.

Formerly an executor could not be compelled of course to secure a future legacy, on the principle that, where the testator had thought fit to repose a trust, unless some breach of it were shewn, or a tendency to a breach, the court would continue to confide in the same hand; for such a purpose it was necessary to shew misconduct on the part of the executor, or his insolvency<sup>3</sup>; or, in the case of an executrix, that she had married a person in needy circumstances<sup>4</sup>. But, according to the present practice, wherever a legacy is payable at a future period, the legatee, without any suggestion of an abuse of the trust, or that the fund is in danger, has a right to call upon the executor to have it divided from the bulk of the estate, and secured and appropriated for his benefit, as well where it is contingent, as where it is vested<sup>5</sup>. Annuities are likewise entitled to the same equity, and to compel the executor to set apart a sufficient fund for the regular payment of their annuities<sup>6</sup>.

c 4 Bac. Abr.  
448. 1 Bro. Ch.  
Rep. 103.  
2 Bro. Ch. Rep.  
58, 232. 3 Bro.  
Ch. Rep. 365.  
Ambl. 273.  
Prac. Reg.  
2d edit. 270.  
d 3 P. Wms.  
335.

If two executors or administrators join in a receipt, one only of whom receives the money, equity has been stated to adopt this distinction, that, in such case, each is liable for the whole<sup>a</sup> as to creditors, who are entitled to the full benefit of law, although one of such personal representatives might have given an effectual discharge; but, that with respect to legatees, or parties claiming distribution, as they have no legal remedy, one executor or administrator shall not be charged merely by joining in the receipt, when the other has received the money: for the addition of his name is only matter of form, the substantial part is the act of receiving, and is only regarded in conscience<sup>b</sup>. But this distinction between legatees, or parties in distribution, and creditors, appears to rest on no authority<sup>c</sup>. The rule is general, that executors, joining in a receipt, shall all be answerable<sup>d</sup>. It has, indeed, in some instances, been broken in upon<sup>e</sup>, and the Master of the Rolls has denied it to be universally applicable<sup>f</sup>. It seems an exception, if an executor receive the money without the consent of his co-executors, and they afterwards sign the receipt<sup>g</sup>.

f 1 Salk 318.  
1 P. Wms. 241.  
1 Eq. Ca.  
Abr. 398.  
2 Vern. 570.  
g 2 Bro. Ch.  
Rep. 117.  
1 P. Wms. 243.  
in not. 3 Bac.  
Abr. 31. in not.  
h 1 P. Wms. 81.  
Prec. Ch. 173.  
3 Atk. 584.  
Ambl. 219.  
2 Bro. Ch.  
Rep. 116.  
i 1 Salk 318.  
1 P. Wms. 241.  
1 P. Wms. 32.  
not. (1).  
k 3 Bro. Ch.  
Rep. 94.  
l 1 P. Wms.  
241. not. 1.  
33. not. 1.

This, however, is clear, from all the cases, that, where, by any act done by one executor, any part of the estate comes to the hands of his co-executor, the former will be answerable for the latter, in the same manner as he would have been for a stranger whom he had enabled to receive it<sup>m</sup>.

Yet,

If



Yet, a co-executor, who proved, but never acted, having received a bill by the post, on account of the estate, and transmitted it immediately to the acting executor, was held not to be responsible for the administration of the property.

m Balchen  
v. Scott,  
2 Vef. jun. 678.

Although one executor admit assets, an account shall be decreed against his co-executor, who does not admit them.

o Com. Dig.  
Chancery,  
(2 G. 3.)  
2 P. Wms. 145.  
1 Bro. Ch. Rep.  
488.

In case executors be decreed to pay interest on account of a breach of trust, they are liable to costs of course. If the executors have acted fraudulently, the court will decree costs against them, although the will direct, that their expences shall be allowed out of the testator's estate.

p Prac. Reg.  
2d edit. 210.  
1 Vef. jun. 294.

q Prac. Reg.  
2d edit. 150,  
151. 2 Atk. 126.

But executors shall have their costs, although they make a claim, and fail, if it were merely submission of the point for the opinion of the court.

r Prac. Reg.  
2d edit. 152.  
1 Vef. jun. 203.

## S E C T. V.

*Of remedies against executors, and administrators in the ecclesiastical court.*

LEGATEES and the next of kin may proceed against the executor or administrator in the ecclesiastical court. That court has not only jurisdiction



tion over the probate of wills, and the granting of administrations, but has also, as incident to the same authority to enforce the payment of legacies, and according to the statute, the distribution of an intestate's effects. In respect to legacies, the cognisance of them in former times belonged exclusively to that judicature. The court of chancery, till Lord Nottingham extended the system of equitable jurisprudence, administered no relief to legatees<sup>b</sup>. In regard also to distribution, equity, as the act of parliament contains no negative words, has a concurrent jurisdiction with the ordinary, and in both cases, as being armed with larger powers, affords a more effectual relief<sup>c</sup>.

The spiritual jurisdiction extends to legacies only of personal property; therefore, if land is devised to be sold for the payment of legacies, they can be sued for only in a court of equity, because they arise out of the real estate<sup>d</sup>. So, it seems, that if a legatee take a bond from the executor for payment of the legacy, and afterwards sue him in the spiritual court for the same, a prohibition will be granted; for, by taking the obligation, the nature of the demand is changed, and becomes a debt recoverable in the temporal courts<sup>e</sup>.

As a court of equity and the spiritual court proceed in these points a concurrent jurisdiction, which of them has first possession of the cause, has the right to proceed<sup>f</sup>. But, where it appears, that the ordinary cannot administer complete justice, equity without

<sup>a</sup> 4 Bac. Abr. 446. 3 Bl. Com. 98.

<sup>b</sup> 5 Term Rep. 692.

<sup>c</sup> Vid. 2 Faabl. 2d edit. 414. not. (d.)

<sup>d</sup> 4 Bac. Abr. 446. Dyer 151. Palm. 120. Cro. Jac. 179. 364. 1 ro. Car. 16. 2 Roll. Abr. 285. 2 Show. 50.

<sup>e</sup> Yelv. 38. 2 Vern. 31. Sed Dodderidge J. contr. 2 Roll. Rep. 160.

<sup>f</sup> 4 Bac. Abr. 447. Toth. 174. Proc. Ch. 548.

without regard to such priority will interpose. As where a husband sues in the spiritual court for a legacy bequeathed to the wife, the court of chancery will grant an injunction to stay the proceedings, since the ecclesiastical judge has no authority to compel a settlement<sup>1</sup>. So, a legacy given to an infant is more properly cognizable in equity, since that jurisdiction can alone secure the money for the child's benefit<sup>2</sup>.

In case a legatee, or the next of kin, elect to sue in the spiritual court, the executor or administrator must there exhibit an inventory of the property, if he has not done so before, and bring in an account<sup>3</sup>.

Of the nature of an inventory I have already treated<sup>4</sup>. It is to contain a full, true, and perfect schedule of the deceased's effects. The account is to state in what manner they have been disposed of<sup>5</sup>.

Neither an executor nor an administrator can be cited by the ordinary *ex officio* to account<sup>6</sup>. The executor, we have seen, is bound by his oath to make an inventory of the personal estate, and exhibit the same into the registry of the spiritual court at the time assigned him for the purpose, and render a just account, when lawfully required, that is to say at the suit of a legatee; and in such case he is bound not only to produce an account but also to prove the items of it<sup>7</sup>.

2 2 Fentl.  
2d ed. 315.  
1 Ask. 516.  
2 Ask. 420.  
Proc. Chan.  
524.

h 1 Vern. 26.  
1 Ask. 491.

i 4 Purn. Excl.  
L. 425.

k Vid. sup.  
192. et. seq.

l 3 Ask. 252.

m Com. Dig.  
Admon. C. 3.  
1 Ask. 315, 316.  
3 Ask. 253.

n 1 Ask. 316.  
Vid. also  
Corp. 141.

The payment of sums under forty shillings shall be proved merely by his oath, if there appear no fraud by dividing greater sums into less. Of the payment of sums to a higher amount, vouchers must also be exhibited. The adverse party shall be at liberty to disprove such account. If it be false, the executor shall be liable to the penalties of perjury.

n 4 Burn Eccl.  
L. 437.  
Ought 347.  
348.  
o 4 Burn Eccl.  
L. 437.  
Ought. 346.

After the death of an executor sums under forty shillings shall not be allowed on the oath of his representative; for such payments can be substantiated only by him who made them.

p 4 Burn Eccl.  
L. 437.  
Ought. 347.

In regard to the administrator before the statute of distribution, according to the condition of the administration bond, he also was bound to exhibit an inventory, and render an account when required. But, pursuant to that statute, the administrator, we may remember, enters into a bond with two or more sureties, conditioned for his exhibiting an inventory of the effects, and an account of the same, at the respective times specified. Therefore, without citation or suit, he ought, in strictness to appear on the day, and produce his account in court. But, in that case, it is neither verified by oath, nor liable to be examined. If, however, a party in distribution, who is in the nature of a legatee by statute, and therefore entitled to an account, shall come in and controvert it; it must be sworn to, and is subject to investigation; when the proceedings shall be the same as in the case of an executor.

q r Salk. 315.  
316.

Thus



id. 4 Burn  
Eccl. L. 426.

Thus it appears, that the stat. 1 Jac. 2. c. 17, which provides, that no administrator shall be cited according to the statute of distributions to render an account of the personal estate of his intestate otherwise than by inventory, unless at the instance or prosecution of some persons in behalf of a minor, or having a demand out of such personal estate, as a creditor, or next of kin, nor be compellable to account before the ordinary; had, in truth, no operation, as such was the law before.

1 Salk. 315,  
316.

All the legatees, or parties in distribution, are to be cited to appear at the making of the account, for it shall not be conclusive on such as shall be absent, and have not been cited. An executor or administrator, therefore, when he is called upon by any one party to account, should cite the legatees or next of kin in special, and all others in general, having, or pretending to have, an interest, to be present, if they think fit, at the passing of the same; and then, on their appearance, or contumacy if not appearing, the judge shall proceed.

4 Burn Eccl.  
L. 426. Swinb.  
p. 6. f. 20.

4 Burn Eccl.  
L. 426. Ought.  
354, 355, 356.  
4 Bac. Abr.  
447. 1 Roll.  
Abr. 298, 299.  
Hob. 12.  
12 Co. 65.  
Herley, 67.  
2 Inst. 608.  
Sid. 161.

1 Cro. Eliz. 83.  
666. Show.  
158, 173.  
Ventr. 291.  
3 Mod. 283.  
1 Ld. Raym.  
220, 346, 2 Ld.  
Raym. 1161.  
1172, 1211.  
2 Salk. 547.  
Carth. 142.

Although the spiritual court have, as incident to the jurisdiction of wills, the jurisdiction also of legacies; yet, if a temporal matter be pleaded in bar of an ecclesiastical claim, they must proceed according to the common law. Therefore, if payment be pleaded in bar of a legacy, and there be but one witness, whom the ecclesiastical court will not admit, because their law requires two witnesses, a prohibition shall issue. But, it is not a sufficient

ground



ground for a prohibition, to suggest, that the plaintiff had only one witness to prove the fact, unless the party alledge he offered such proof, and it was refused for insufficiency.

a Carth. 143,  
1 4.

After the investigation of the account, if the ordinary find it true and perfect, he shall pronounce its validity. And, in case all parties interested above mentioned have been cited, such sentence shall be final, and the executor or administrator shall be subject to no farther suit.

a 4 Burn Eccl.  
L. 428  
Swinb. p. 6.  
c. 21.

In case there shall appear assets for the entire, or partial payment of the legacy, or for a distribution, the same shall be decreed accordingly.

An executor or administrator is also bound to exhibit an account upon oath, at the promotion of a creditor; but a creditor is not permitted to call for vouchers, nor to offer any objections to the account; in respect to him the oath of the party is once conclusive; For such litigation would be altogether fruitless, since the spiritual court has no authority to award the payment of a debt.

b Vid. Noy 28.

The object of a creditor in suing for an account in the spiritual court is to gain some insight into the state of the fund, previously to his proceeding in an action at common law; but a bill in equity for a discovery of the assets is the more usual, as it is the more effectual remedy.

c Vid. supr.  
372, 377.

Yet,

Yet, a creditor, as well as the next of kin, has a right *ex debito justitiæ*, to an assignment by the ordinary of the administration bond, and to sue in the name of the ordinary, as well the sureties as the principal, shewing for breach the administrator's not exhibiting a true inventory, or account<sup>d</sup>. But a creditor has no right in such case to assign for breach the nonpayment of his debt, or a *devastavit*; for the words of the condition, "he is well and truly to administer," are construed to apply merely to the bringing in of a true inventory and account, and not to the payment of the intestate's debt's<sup>e</sup>.

d 3 Ark. 248.  
Corp. 140.  
Vid 2 Fonbl.  
414. 2d edit.  
not. (d)

e 4 Burn Eccl.  
L. 428, 430.  
Lutw. 882  
1 Salk. 315, 316.  
Com. Dig.  
Admon. C. 3.

An executor or administrator shall be allowed in the spiritual court all his reasonable expences, the rule in respect to which is, that he shall receive no profit, nor incur any loss<sup>f</sup>. A party having an interest, who prays an account, shall not be condemned in costs, unless he make objections to it, which he fails to substantiate<sup>g</sup>.

f 4 Burn Eccl.  
L. 428.  
Lind. 178.

g 4 Burn Eccl.  
L. 428.  
Floy 38.

A legacy may be recovered in the spiritual court against an executor of his own wrong<sup>h</sup>.

h 4 Bac. Abr.  
488. 1 Roll  
Abr. 919.

Legatees may file a bill in chancery for an account against the executor, and, at the same time call upon him in the prerogative court to exhibit an inventory<sup>i</sup>.

i 1 Vin. Abr.  
427. 3 Chan.  
Rep. 72.

THE END.

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OF REMEDIES AGAINST EXACTORS

Let a creditor, as well as the state of his  
right to debt, be subject to an assignment by  
any party of the administration bond, and to have  
the name of the assignee as well as the name  
of the principal, inserted in breach the admini-  
stration's not exhibiting a true inventory, or in  
count. If a creditor has no right in such  
assignee for breach the responsibility of his debt  
of a creditor for the words of the condition  
"it is well and truly administered," the  
state is not bound to the payment of a debt

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# APPENDIX

OF

## STAMP DUTIES.

It is to be observed that the law in this respect  
is not uniform. A party having a right  
to sue, who pays an ad valorem duty, shall not be com-  
pelled to pay a specific duty in addition to it, which  
he shall be liable to pay.

A party may be recovered in the law  
court of law, in a case of his own wrong.

Let us now see what is the liability for an  
account against the executor, and at the same time  
will upon him in the probate court to exhibit  
an inventory.

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## APPENDIX

OF

## STAMP DUTIES.

On PROBATES of WILLS or LETTERS of ADMINISTRATION.

	Affessments.	Total Duty.	Statutes.
Of any estate above 20l. and under 100l. value	<div> <div>- - - 0 5 0</div> <div>Add<sup>d</sup> 0 5 0</div> </div>	0 10 0	<div>5 &amp; 6 W. &amp; M. c. 21.</div> <div>9 &amp; 10 W. 3. c. 25.</div>
Of or above the value of 100l. and under 300l.	<div>ditto 0 20 0</div> <div>ditto 0 20 0</div>	2 10 0	<div>19 G. 3. c. 66.</div> <div>23 G. 3. c. 58.</div>
	<div>- - 0 5 0</div> <div>Add<sup>d</sup> 0 5 0</div>		<div>5 &amp; 6 W. &amp; M. c. 21.</div> <div>9 &amp; 10 W. 3. c. 25.</div>
Of or above the value of 300l. and under 600l.	<div>ditto { 0 20 0</div> <div>0 20 0</div> <div>ditto { 0 20 0</div> <div>0 20 0</div> <div>ditto 0 20 0</div> <div>ditto 2 10 0</div>	8 0 0	<div>19 G. 3. c. 66.</div> <div>23 G. 3. c. 58.</div> <div>29 G. 3. c. 51.</div> <div>37 G. 3. c. 90.</div>
Of or above the value of 600l. and under 1,000l.	<div>Add<sup>d</sup> 0 20 0</div> <div>ditto 0 30 0</div> <div>ditto 1 10 0</div>	12 0 0	<div>23 G. 3. c. 58.</div> <div>29 G. 3. c. 51.</div> <div>37 G. 3. c. 90.</div>
	C c 3		

*On PROBATES of WILLS or LETTERS of ADMINISTRATION.*

	Affidments.	Total Duty.	Statutes.
Of or above the value of 1,000l. and under 2,000l.	Add <sup>l</sup> 0 10 0 ditto 2 10 0 ditto 2 10 0 ditto 2 0 0	20 0 0	23 G. 3. c. 58. 29 G. 3. c. 51. 35 G. 3. c. 30. 37 G. 3. c. 90.
Of or above the value of 2,000l. and under 5,000l.	Add <sup>l</sup> 3 10 0 ditto 2 10 0 ditto 4 0 0	30 0 0	29 G. 3. c. 51. 35 G. 3. c. 30. 37 G. 3. c. 90.
Of or above the value of 5,000l. and under 10,000l.	Add <sup>l</sup> 5 0 0 ditto 5 0 0 ditto 5 0 0	45 0 0	29 G. 3. c. 51. 35 G. 3. c. 30. 37 G. 3. c. 90.
Of or above the value of 10,000l. and upwards*	Add <sup>l</sup> 10 0 0 ditto 5 0 0	60 0 0	35 G. 3. c. 30. 37 G. 3. c. 90.

\* By 23 Geo. 3. c. 58. and 37 Geo. 3. c. 90. Probates and Letters of Administration of common sailors or soldiers dying in his majesty's service, are subjected to duty, but are specifically exempted by all other acts.

[Heraud's Stamp Table, 23, 24.]

*(Faint, illegible text from the reverse side of the page, likely bleed-through from the next page.)*

# APPENDIX.

38c

## ON RECEIPTS FOR LEGACIES, OR SHARES OF PERSONAL ESTATE.

	Assessments.	Total Duty.	Statutes.
Given or passing to Wife, Children, or Grandchildren, not exceeding the value of 20l. or under	Single 0 2 6	2 6	20 G. 3. c. 28.
Of the value of 20l. and under 100l.	Single 0 5 0	5 0	
Of 100l. or upwards	Single 0 20 0	0 0	
To all other persons, under 20l.	- - - 0 2 6	0 5 0	20 G. 3. c. 28.
Of or above 20l. and under 100l.	Add <sup>l</sup> 0 2 6	0 10 0	23 G. 3. c. 58.
	- - - 0 5 0		20 G. 3. c. 28.
	Add <sup>l</sup> 0 5 0		23 G. 3. c. 58.
Of 100l. and every further 100l. to the amount of 300l. each 100l. and the next 100l. to the amount of 400l. and every further 100l. over and above 400l. each 100l.	- - - 0 20 0	2 0 0	20 G. 3. c. 28.
	Add <sup>l</sup> 0 20 0		23 G. 3. c. 58.
	Ad. 20s. p. cent.	1l. p. cent.	23 G. 3. c. 58.
	ditto 0 20 0	2 0 0	29 G. 3. c. 51.
	Ad. <sup>20s.</sup> <sub>20s.</sub> p. cent.	2l. p. cent.	29 G. 3. c. 51.

36 Geo. 3. c. 52. enacts, that Legacies left by persons who may have died previous to April 27th, 1796, should only remain subject to the preceding duties; FROM whence (inclusive) the following Duties should commence, and wholly exempts legacies bequeathed for the benefit of husband—wife—children, or grand-children, and the royal family; legacies of any description, UNDER 20l. and legacies out of personal estate, or clear residue thereof, the clear personal estate being under 100l. value.



## ON LEGACIES, OR SHARES OF PERSONAL ESTATE.

	Assessments.	Total Duty.	Statutes.
Legacy of 20l. or upwards given out of Personal Estate, and also upon the clear residue of Personal Estate, and every part thereof, whether accruing by virtue of a will or on an intestacy, and such residue is of the value of 100l. or upwards)—given or passing to Brother or Sister of the deceased or their Descendants—each 100l. greater or less sum in proportion	Single 2l. per cent.	2l. p. ct.	36 G. 3. c. 52.
Given to Uncle or Aunt or their Descendants <i>ex parte paternâ vel maternâ</i>	Single 3l. per cent.	3l. p. ct.	
Great Uncle or Great Aunt or their Descendants <i>ex parte paternâ vel maternâ</i>	Single 4l. per cent.	4l. p. ct.	
Any other degree of collateral Consanguinity than above described, or any stranger in blood to the deceased.*	Single 6l. per cent.	6l. p. ct.	

\* LEGACIES of ANNUITIES of whatever description, whether charged on personal or real estate, are liable to the same duties: such duties to be paid at *four equal annual payments*: the *first* of which payments to be made on completing the payment of the first year's annuity, and the others in like manner successively: *unless* the annuitant shall die in the interim of such four years, *then* proportionably according to the number of payments made. THE VALUE of such annuities to be calculated according to the tables in the schedule of the act 36 G. 3. c. 52. Duty on

LEGACIES

LEGACIES given to PURCHASE annuities, to be calculated on the sum necessary to purchase them; and *duty* on LEGACIES the value of which can only be ascertained by application of the allotted fund, to be charged on the money as applied: *duty* on legacies to be enjoyed by different persons in succession of the same degree of kindred, and chargeable with the same rate of duty, to be charged and paid as in the case of a legacy to one person; but if such persons are of different degrees of kindred, and chargeable with different rates of duty, then all persons becoming entitled for life only, or other temporary interest, to be chargeable with the duty in the same manner as if bequeathed by way of annuity, and to be paid when they shall so respectively become entitled, by equal portions, during the aforesaid term of four years; and any other partial interests to be charged in like manner.—Plate, furniture, or other things not yielding income, to be enjoyed in kind by different persons in succession, not to be chargeable while so enjoyed in any kind with any duty, until in possession of persons having power to dispose thereof. Duty on legacies enjoyed in succession, to be charged as such, whether taken under wills or by intestacy. Duty on legacies in joint tenancy, to be paid in proportion to the interest of the parties. Duty on legacies subject to contingencies, to be charged as for absolute bequests (unless chargeable as annuities). Legacies subjected to power of appointment, to be charged with duty as property given to persons in succession, or absolutely according to the construction and limitations of such power. Money, or personal estate, directed to purchase real estate, to be charged as personal estate until applied in manner before mentioned; but no duty to accrue after the same shall have been so applied. Estates *pur autre vie*, applicable as personal estates, to be charged as such. Duty on property not reduced into money, to be charged agreeably to a valuation to be made by executors or administrators; but if the commissioners of stamps are dissatisfied therewith, then they are themselves to cause a valuation to be made, and then in case the same shall be objected to by executors, &c. an appeal to be made to the land tax commissioners, whose judgment shall be final—all expences to be borne by the mistaken party. Money left to pay duty, not chargeable as a legacy. Duty on legacies not satisfied in money, to be paid according to the value of the satisfaction. But if at the end of *two years* it shall appear that it will be difficult to ascertain the *residue* of the personal estate, the *duty may be compounded for*—with many other regulations and directions as by the act 36 G. 3. c. 52. PRINTED forms of receipts to be procured and duties paid at the *Legacy Receipt Office, Stamp Office,*

*Office, Somerset-Place, or of or to any distributor of stamps in the country. DUTIES to be accounted for and paid by executors or administrators on retaining or paying legacies, and to be deducted and retained by them out of such legacies, and to be a debt from them to his majesty: but executors paying legacies without deducting the duty, both legatee and executor accountable for the same. RECEIPTS to be stamped within twenty-one days after date, or within three months, on payment of duty and 10l. per cent. penalty. And a penalty of 10l. per cent. for paying or receiving legacies without stamped receipts—and neglecting to pay duty within fourteen days after the same ought to have been paid as aforesaid, to forfeit treble the value of the duty. Penalty of 500l. for altering the receipts.*

[*Herand's Stamp Table, 19, 20.*]

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